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90-807

No. ___

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States
October Term, 1990

In Re: WILLIAM M. KUNSTLER; In Re: BARRY NAKELL; In Re: LEWIS PITTS,

Petitioners,

ROBESON DEFENSE COMMITTEE, et al.,

Plaintiffs,

vs.

JOE FREEMAN BRITT, et al.,

Defendants-Respondents.

PETITION FOR A WRITT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF LEWIS PITTS

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QUESTION PRESENTED*

Whether the repeated material distortions of the factual record by both lower Federal courts, so as to (a) conceal violations by county and state law enforcement officials of the First and Sixth Amendment rights of Native Americans and African Americans, and (b) justify sanctions against petitioners, trampled elementary concepts of judicial integrity, objectivity and due process and reflect a clearly emerging pattern of misuse of Rule 11 designed to punish and deter advocacy of civil rights.

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* Petitioner hereby incorporates by reference the Questions Presented of Petitioners Kunstler and Nakell and their supporting arguments, as he believes they reflect symptoms of the core question as presented above.

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[1] Mr. William M. Kunstler, Mr. Barry Nakell, and this Petitioner, Lewis Pitts, were the Appellants in the Court of Appeals and are Petitioners here. Each is separately represented and is submitting a separate Petition. Appellees in the Court below (Respondents here) were those listed as Defendants-Appellees in the caption of the Order sought to be reviewed, attached at A1

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPINIONS IN THE CASE

The opinions of the Court of Appeals and District Court on sanctions are not yet reported. The opinion of the Court of Appeals is annexed as an appendix, at A1. The opinion of the District Court is annexed, at A63.

JURISDICTIONAL GROUNDS IN THIS COURT

The opinion and order sought to be reviewed were entered on September 18, 1990. The order denying petitioner's timely petition for rehearing and his suggestion for rehearing in banc was entered on October 11, 1990, A97.

28 U.S.C. Sec. 1254(1) confers jurisdiction on this Court to review this case by writ of certiorari.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES & REGULATIONS INVOLVED IN THE CASE

Annexed in the Appendix are the texts of the Fifth Amendment to the United States

Constitution, A143, and Rule 11, Federal Rules of Civil Procedure, A144.

STATEMENT OF THE CASE

Petitioner is an attorney and director of a public interest law firm in North Carolina. The Rule 11 proceeding at issue in this Petition arises out of the efforts of petitioner and two other attorneys to protect the rights of Native American and African American residents of Robeson County, North Carolina, to engage in protected First Amendment activities.

Robeson County is a very poor, mostly rural area where over 60% of the residents are Indian or Black. Drug trafficking is a major problem. There has been a general climate of fear, effectively chilling and intimidating Indian and Black citizens from the full exercise of their First Amendment freedoms.

On February 1, 1988, two young Native Americans, Eddie Hatcher and Timothy Jacobs, forcibly took over the offices of the local newspaper. That incident ended peacefully after ten hours with an agreement between Hatcher and an aide to the North Carolina governor, pursuant to which, inter alia, Hatcher and Jacobs were permitted to surrender to federal rather than state authorities, because of Hatcher and Jacobs' fear of the local authorities.

Hatcher and Jacobs had taken over the newspaper to protect themselves from what they perceived to be an imminent threat of harm from law enforcement officials (particularly the sheriff) who, their information showed, were complicit in illegal drug trafficking. They also sought to motivate the Governor of North Carolina to investigate alleged corruption in the criminal justice system in Robeson County, including

the sheriff's department, district attorney's office, and State Bureau of Investigation, and the death of a Black jail inmate in the Sheriff's custody.

Hatcher and Jacobs were indicted in the Eastern District of North Carolina on federal charges stemming from the takeover, including hostage taking and weapons charges. The local District Attorney then dismissed state warrants against them. On October 14, 1988, after a three week trial in federal court, Hatcher and Jacobs were acquitted by a jury of all charges.

Petitioner was one of Jacobs' attorneys. Hatcher was represented by noted civil rights attorney William Kunstler and Barry Nakell, a law professor. Though separately represented, Hatcher and Jacobs put on a joint defense.

After the acquittal Hatcher returned to Robeson County and became involved with

political work to create social change for Black and Indian residents of Robeson County. With other Indian and Black residents of Robeson County he engaged in lawful activities protected by the First Amendment, to eliminate the discrimination and oppression of the black and Indian citizens, clean up the alleged corruption in the county, and otherwise bring about political change. Toward these ends, Hatcher and others associated with the Robeson Defense Committee held public meetings and began circulating a petition, pursuant to state law, seeking the removal from office of the county sheriff (Hubert Stone) and his son, a deputy sheriff.

The petition campaign was initially quite successful. Soon, however, various officials and/or agents of the county sheriff's department, the SBI, and the District Attorney's office began to engage in

activities and make public statements which had the effect of intimidating potential supporters and participants, disrupting the petition campaign, and suppressing political dissent.

In particular, the District Attorney's office and SBI, with great and unusual publicity, made false statements suggesting other persons had been involved in the newspaper takeover with Hatcher and Jacobs and that officials had intensified their investigation of potential conspiracy charges against others who might have been involved. SBI officials confirmed publicly that the District Attorney, Joe Freeman Britt, had requested their assistance, and that the investigation had widened to include other charges.

In fact, this "investigation" appeared to be a sham as the possibility of conspiracy had already been thoroughly in-

vestigated and discarded as part of the Federal prosecution.

Pursuant to this sham investigation, SBI agents, including Agent James Bowman, interrogated Indian and Black persons believed to support Hatcher or the petition drive concerning political activities, including the activities of the Robeson Defense Committee. They sought membership rolls of the Tuscarora Tribe, to which Hatcher and Jacobs belonged, and asked questions about the activities of petitioner and his associates.

At the same time the Robeson County Sheriff's Department pressured the public school system and caused it to deny the Robeson Defense Committee use of school facilities for meetings, contrary to school policy, because of the Committee's criticism of the Sheriff's Department.

Hatcher and others from Robeson County

informed petitioner and attorney Nakell about the above problems and that these developments were frightening people away from the petition campaign.

Petitioner and Nakell confirmed these accounts with various people, including three officials of the public schools, a Chief of the Tuscarora Tribe, the editor of the local Indian newspaper, and the head of security at a local college.

In November and December, 1988, Nakell, pursuant to a relationship established previously with the office of the state Attorney General (Lacy Thornburg) out of concern about conditions in Robeson County, wrote two long, detailed letters to the Attorney General about the conduct of SBI agents (especially Agent Bowman), the District Attorney's office, and the Sheriff's Department. He requested that the Attorney General investigate and take action because

of the questionable nature and intimidating effect of the law enforcement conduct and its interference with protected activities.

Nakell also made calls to a Deputy Attorney General who had been assigned by the Attorney General to work with Nakell. Initially Nakell received a positive response, suggesting the issues he identified were being taken seriously.

On December 6, 1989, the District Attorney (Joe Freeman Britt) secured indictments against Hatcher and Jacobs on state kidnapping charges for the newspaper takeover. Jacobs was soon arrested in New York State. He then faced extradition proceedings, in which he was represented by petitioner.

Petitioner received reports that SBI Agent Bowman and an employee of the District Attorney's office (Lee Edward Samp-

son, the Witness Coordinator) were making approaches to Jacobs' family, without notice to petitioner, and requesting that they advise Jacobs that he should dismiss his attorneys (petitioner and his associates), return voluntarily to Robeson County, testify against Hatcher, and implicate others in the alleged conspiracy. Compliance would win him "green stamps."

These backdoor approaches, with their promises of help if he dismissed his counsel (petitioner), were very upsetting to Jacobs and interfered with his relationship with petitioner and his joint defense with Hatcher. Jacobs, age 20, vacillated about whom to trust and what course to follow.

Sampson, from the DA's office, also told Jacobs' family that nobody was "actually mad" at Jacobs but that law enforcement people were mad at Hatcher because he

was "running his mouth."

Petitioner sought to verify the reports he was receiving. On December 29, 1988 he obtained tape recordings of telephone conversations in which Bowman and Sampson made such approaches to Jacobs' family. Bowman's and Sampson's statements to the Jacobs family indicated coordination between the two of them and implicated the District Attorney in the efforts to make a deal with Jacobs.

Also in December, Nakell received a phone call from the Deputy Attorney General with whom he had been dealing. This official indicated to Nakell that he knew there were problems in Robeson County but that the "Willie Horton Syndrome" had taken over and the door was closed to him for political reasons by the head of the SBI (Morgan), so that Nakell could expect no more help from that office.

Petitioner and Nakell decided to seek injunctive relief against the interference with the rights of Hatcher and Jacobs and other activists to engage in activity protected by the First Amendment and against the interference with Jacobs' and Hatcher's Sixth Amendment rights. During January 1989 counsel engaged in research and further investigation, and circulated drafts among various lawyers, including another attorney with recognized expertise in Section 1983 litigtion.

On January 31, 1989, the complaint in Robeson Defense Committee v. Britt was filed in the Eastern District of North Carolina, signed by Nakell. The First Amended Complaint, signed by Nakell, Kunstler and petitioner, was filed March 16, 1989.

Plaintiffs included the Robeson Defense Committee, Hatcher and Jacobs, and

six Indian and Black residents of Robeson County who were officers or active members of the Robeson Defense Committee. Petitioner represented Timothy Jacobs and his mother, and Kunstler and Nakell represented the other plaintiffs.

The suit named nine defendants including District Attorney Britt, Richard Townsend (Britt's successor as DA), Sampson, SBI Agent Bowman, Sheriff Stone, Robert Morgan (head of the SBI), Lacy Thornburg (Attorney General), Robeson County, and Governor Jim Martin (named solely for injunctive relief against the pending extradition requests). There were also a number of John Doe defendants.

The suit, brought pursuant to 42 U.S.C. Sec. 1983, alleged that defendants violated plaintiffs' First, Fifth, Sixth and Fourteenth Amendment rights by engaging in a campaign of harassment and intimidation for

the purpose of suppressing political dissent in Robeson County. The suit sought injunctive relief against the ongoing violations of First and Sixth Amendment rights and against the state prosecution and extradition of Hatcher and Jacobs. The suit also sought damages.

Plaintiffs immediately sought to depose SBI Agent Bowman, key witness in both the First and Sixth Amendment violations, but the district court stayed all discovery pending hearing on the state's motion for a protective order. Plaintiffs filed papers opposing the motion, but the court failed to schedule a hearing.

The state and county defendants filed motions to dismiss.

Meanwhile, with the suit stalled in court, the approaches to Jacobs through his family had continued and been effective in undermining the relationship between peti-

tioner and Jacobs and between Jacobs and Hatcher. Jacobs decided to return to North Carolina and seek a plea independent of Hatcher. He was returned to the state and accepted local appointed counsel and sought a plea. At the same time, the particular activities of the sheriff's department and SBI directed at the petition drive had apparently ceased, having succeeded in crushing the petition drive through the campaign of harassment and intimidation.

Petitioner, Nakell and Kunstler decided to withdraw the suit in light of the changed objective circumstances - particularly the mootness of key requests for injunctive relief - in favor of concentrating on the criminal defense of Hatcher. The damage claims alone were not worth pursuing, and the remaining substantive issues (such as double jeopardy) could be pursued in the state prosecution of Hat-

cher.

Counsel for the state and for the county defendants indicated that they would have no objection to dismissal of the suit, with prejudice, pursuant to Rule 41(a)(2), Fed.R.Civ.Pro. Plaintiffs moved for dismissal. On May 2, 1989, three months after the suit was filed, the district court dismissed it. There had been no hearings or discovery, and no substantive motions had been decided.

Six weeks later the state defendants moved for sanctions under Rule 11, Fed.-R.Civ.Pro., followed two weeks later by the county defendants. Plaintiffs submitted briefs, affidavits and other documentary material and unsuccessfully sought an evidentiary hearing. The district court heard oral argument on the Rule 11 motions on September 8, 1989. This was the first time the district court had met counsel.

On September 29, 1989, the District Court held that Pitts, Nakell and Kunstler had violated all three prongs of Rule 11 by filing the suit. A89-90. The court also held that dismissal of the suit pursuant to Rule 41(a)(2), without reservation of terms or conditions and without any previous notice of defendants' intention to seek sanctions, did not preclude defendants' Rule 11 motions. A70.

The district court first addressed the question of counsels' purpose. It found that "plaintiffs' counsel never intended to litigate this Sec. 1983 action and ... filed it for publicity, to embarrass state and county officials, to use as leverage in criminal proceedings, and to intimidate those involved in the prosecution of Hatcher and Jacobs." A79. The court rejected counsels' explanations for the dismissal as not credible, though no evidentiary

hearing was held. A74, 77.

The court also said of the complaint that "(m)uch of it, if not all of it, fails to show that any plaintiff is entitled to any relief," A 80, and that "(a) reasonable attorney would not have believed that this complaint was well grounded in fact or warranted by existing law." A90.

The court held the three attorneys jointly and severally liable for defendants' full attorneys fees and expenses -- $92,834.28. A93-94. The court also imposed punitive sanctions of $10,000 on each attorney, because of the "egregious nature of the violations" (particularly, publicizing the filing of the suit) and barred them from appearing in or practicing before the district court until the sanctions were paid. A95.

Pitts, Kunstler and Nakell appealed, 89-2815. Oral argument was held June 5,

1990. On September 18, 1990 the Court of Appeals affirmed in part, vacated in part, and remanded with instructions for reconsideration of the appropriate sanction. A4, A62.

The Court of Appeals affirmed the determination that Pitts, Nakell and Kunstler had violated all three prongs of Rule 11, A48. The Court vacated the type and amount of sanctions, however, because the District Court had proceeded on the erroneous premise that the primary purpose of Rule 11 was compensation, and because the conduct of publicizing the suit's allegations was not punishable under Rule 11, A60-61.

The court also upheld the denial of an evidentiary hearing on whether counsel had violated Rule 11, A44, 48-49, but held that due process required that counsel have some opportunity to contest the type and amount

of sanctions. A49.

Requests for rehearing and rehearing in banc were denied on October 11, 1990. A97.

REASONS FOR GRANTING THE WRIT

This case tests whether the Federal courts are serious when they say that the Federal courts are the guardians of constitutional rights, and that Rule 11 must not be used to chill vigorous advocacy and creativity. But the underlying issue here is even more fundamental: whether the Federal courts are committed to integrity in the fact-finding process even in controversial cases where attorneys representing unpopular clients challenge the conduct of public officials.

It is not simply the result which was wrong here, but the gross deviation from the judicial process.

This case was not heard objectively and

fairly by either the District Court or the Court of Appeals. For example:

* Both courts sanctioned plaintiffs' counsel for filing a "baseless" complaint after considering the legal and factual basis of only two of six causes of action and completely ignoring the legally and factually strongest claims.

* In 66 pages of slip opinions by the two courts, neither court ever acknowledged that plaintiffs produced a veritable "smoking gun" - transcripts of tape recordings of two of the defendants caught in the act of exactly the conduct they were accused of: going behind petitioner's back and interfering in Timothy Jacobs' right to counsel and the joint defense of Hatcher and Jacobs.

* The heart of the case was an effort by the defendants to stop plaintiffs' petition drive for removal of the sheriff,

yet in 66 pages of opinions, neither court ever mentioned the claim against the Sheriff and his deputies for unconstitutional retaliation against the petition drive through interference with plaintiffs' meeting places, or the factual basis for this claim. Counsel were found liable for Rule 11 violations against these County defendants without any explanation of how they violated Rule 11 with regard to these defendants.

* Section 1983, pursuant to which this case was brought, constituted the federal courts as "guardians of the people's federal rights", Mitchum v. Foster, 407 U.S. 225, 242 (1972). Yet both courts were totally silent about the compelling evidence of outrageous conduct by some of the defendants, under color of state law, in violation of the Constitutional rights of Indian and Black citizens of Robeson Coun-

ty. Instead, the courts castigated petitioner, Mr. Nakell and Mr. Kunstler for making "irrelevant" and "scandalous" allegations about public officials and attacked their motives for filing this suit.

* Both courts berated counsel for alleged "mistakes" and "inaccuracies" and yet repeatedly misstated the allegations of the complaint and plaintiffs' arguments and mischaracterized the evidence, and justified their decisions with these mischaracterizations and misstatements.[1]

The rationale behind deferential ap-

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[1] Both courts mischaracterized the complaint as centered on an effort to enjoin the state prosecution of Hatcher and Jacobs - only one of plaintiffs' six claims. One of severals grounds for this request was the allegation that the state prosecution breached a no-state-prosecution agreement made by the Governor. Both courts inexplicably termed this allegation the "basis of the complaint". This had serious consequences. It set the stage for both courts to reject counsels' truthful explanations for dismissal of the complaint and find improper purpose. See infra at 59-60.

pellate review of district court Rule 11 decisions is that, "(f)amiliar with the issues and litigants, the district court is better situated than the court of appeals to marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." Cooter & Gell v. Hartmarx, 496 U.S. ___, 110 S.Ct. 2447, 2459 (1990).

The function of an appellate court is to determine whether the district court's "account of the evidence is plausible in light of the record viewed in its entirety." Id., 110 S.Ct. 2458.

Nothing could be clearer in Cooter than that Rule 11 decisions are to be based on facts, "the record viewed in its entirety."

Here there was such a lack of integrity in the fact-finding process that the district court's opinion bears little relationship to the record in this case. Instead of saying the emperor was naked, the

Court of Appeals twisted law, blinked at facts and strained to justify the unjustifiable.

There is a huge gap between the rhetoric used to describe both the complaint and counsels' conduct - a blizzard of bold, chastising words like "egregious" and "reprehensible" - and the reality of this case. In the words of Lewis Carroll, "(I)f it was so, it might be; and if it were so, it would be; but as it isn't it ain't."

The district court went through the motions of giving counsel a chance to be heard, but ignored their evidence and their arguments and relied on non-facts instead. The Court of Appeals used appropriate-sounding words and case cites, but they are so disconnected from the record as to be mere slogans.

The "reality gap" in these opinions cannot be explained by carelessness or

justified by "deferential review." The repeated, systematic, implausible misreadings of the complaint, the failure to acknowledge the undeniably substantial, well-supported claims of serious constitutional violations, and the strained effort to justify denial of an evidentiary hearing - these cannot be "mistakes," particularly when the Court of Appeals embraced them after very specific post-oral argument filings by petitioner and Mr. Nakell, filed by leave of the Court of Appeals, addressing these very points.

The problem in this case was not the lack of a factual basis; it may have been what those facts were and who the parties and attorneys were. Justice Douglas wrote, "I know of no more serious danger to our legal system than occurs when <u>ideological</u> trials take place behind the facade of

legal trials."[2] That appears to be what happened here.

Whatever the reason, however, the fact is the referees "cheated." Not to address this amounts to an open invitation to courts to use Rule 11 as a conscious political weapon.

As has been noted in numerous critical articles and studies, Rule 11, despite its salutary purposes, lends itself to such abuse. There has already been a disproportionate use of Rule 11 against plaintiffs' lawyers in civil rights cases. If this Court permits the gross abuse of Rule 11 in this case, the clearly foreseeable effect is to deter the bringing of non-frivolous suits challenging the powerful and well-connected, regardless of the facts. That would serve the ideological

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[2] William O. Douglas, The Court Years 1939-1975 (Random House, 1980) 84.

predilections of some, but it would judicially undermine the express policy of Congress as embodied in Sections 1983 and 1988.

An Advisory Committee of the Judicial Conference has scheduled hearings on Rule 11 because of the widely recognized problems. This case shows that if the focus is only on changing the rule the problems won't be solved. The problem here is not Rule 11, but the lack of integrity in the fact finding process, whether through sloppiness or a tendency to evaluate the facts through the screen of ideology or particular bias or to accomplish a particular result - the antithesis of an impartial judiciary.

I. Neither the District Court nor the Court of Appeals fairly and objectively considered the complaint or the legal and factual bases for it.

In determining whether an attorney has violated Rule 11,

> The court must consider factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper.

Cooter & Gell v. Hartmarx Corp., supra, 110 S.Ct. 2457. The Court of Appeals agreed there was no factual basis for one subcomponent of one of six claims,[3] - but otherwise failed to discuss either the factual basis of the complaint or the nature of the prefiling inquiry conducted by petitioner and his co-counsel.

The court must also consider "legal issues" - i.e., "whether a pleading is 'warranted by existing law or a good faith argument' for changing the law." Id. Neither court addressed the legal basis for several claims, particularly the claims of

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[3] The Court said there was no factual basis for the claim that certain defendants made a commitment to Hatcher that there would be no state prosecution of Hatcher and Jacobs - only one of several bases for the request for injunctive relief against the state prosecution. A20.

plaintiffs other than Hatcher and Jacobs, as well as Hatcher and Jacobs' Sixth Amendment claim. Both made material errors of law in evaluating "standing," double jeopardy, and "bad faith" prosecution.

Both courts ignored the heart of the complaint and mischaracterized it as centered on an effort to stop the state prosecution of Hatcher and Jacobs - only one claim of six. E.g., A40, A77-78.

The suit grew out of the petition campaign and interference with it, as described in the two letters of Mr. Nakell to the Attorney General before the suit was filed. The heart of the complaint is the charge that defendants retaliated against plaintiffs' protected political activity by conspiring to conduct a multifaceted campaign of intimidation and harassment in order to crush those activities and suppress dissent. A118-119. The state prose-

cution was only one part of this anti-First Amendment campaign. A128, et seq. The court ignored the others.

(A) The County defendants' violations of plaintiffs' First Amendment rights (Fourth Claim). The complaint alleges that the county sheriff and his deputies coerced the public schools to violate school policy and deny plaintiffs use of school facilities for meetings, and that this coercion was being carried out by denying government services (security) to the public high school, in retaliation for the high school having allowed plaintiffs to meet there to discuss their criticism of the sheriff. A125. As a result of the sheriff's pressure on the school system, school officials cancelled plaintiffs' use of one school building shortly before a scheduled public meeting and tried to cancel permission to use another.

Mr. Nakell confirmed these facts with the school board chairman, the school superintendent, and the high school principal before filing the complaint.[4]

Neither the district court nor the panel discussed this claim. The county defendants were awarded sanctions against appellants without any explanation. A93.

(B) State Defendants' violations of plaintiffs' Sixth Amendment rights (Second Claim). Plaintiffs alleged that pursuant to the conspiracy to crush the petition drive and repress dissent, four of the state defendants acted to interfere with the attorney-client relationship between Jacobs and his attorneys, and to sow dissension between Jacobs and Hatcher to disrupt their joint defense. A122-24. De-

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[4] The sheriff, in an affidavit filed in this suit, denied knowledge and responsibility, but did not deny retaliation occurred.

fendants wanted to get petitioner and his associates out of the case because of their successful defense in the Federal trial, which openly criticized law enforcement corruption.

Appellants did not rely solely on information from their clients; they obtained transcripts of two phone calls between defendants Bowman (SBI) and Sampson (from the DA's office) and members of Jacobs' family in which the defendants were caught in the act.[5]

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[5] When Jacobs' mother said she felt her son had good lawyers, Agent Bowman said:

> Well, that's your opinion and your and you've got a right to it. . . . (B)ut I feel like there's just been too much of an interest in getting stuff into the newspaper and holding press conferences and making claims about Robeson County without actually specifically presenting any evidence of it and I think advice from somebody who is not from here is not always the best advice.
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> (If Jacobs waived extradition) I would tell the Magistrate that I think he has shown enough good faith on his part that

(continued...)

The facts alleged demonstrate violation of Jacobs' right to counsel. See United States v. Chavez, 902 F.2d 259

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[5](...continued)
I feel like that an unsecured bond would be in order. . . . I can guarantee you that if I could not get an unsecured bond he would not go to the Robeson County jail.

Bowman also urged that, if extradited, Jacobs should not seek a change of venue since "a Robeson County jury knows more of what is going on down here than juries from outside the area."

Sampson said District Attorney Britt's "position was, you know, if he'd come in and plead guilty to it and testify against Hatcher then he knew he'd have some green stamps coming to him."

Sampson advised Jacobs' grandfather to have Jacobs hire "a local lawyer:"

> If he decides to work with the state he'd be better off to come down here and qualify, I'm sure he'll qualify, for a court appointed lawyer -- just get him a local lawyer. Somebody that's familiar with the system down here, that can work within the system -- rather than bringing somebody out of the system (who) doesn't know their way around and -- it's like bringing in a hired gun and everybody gets ready to fight.

(4th Cir. 1990).[6] It was also reasonable for plaintiffs to allege that these facts demonstrated interference with the joint defense of Hatcher and Jacobs. See In re: Grand Jury Subpoenas, 902 F.2d 244 (4th Cir. 1990).[7]

Neither court discussed this claim, its legal merit, nor the shocking evidence.[8]

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[6] See also, United States v. Morrison, 449 U.S. 361, 366-7 (1981); United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964).

[7] See also, Holloway v. Arkansas, 435 U.S. 475, 482-483 (1978); cf., Cuyler v. Sullivan, 446 U.S. 435 (1980).

[8] By contrast, both courts harped on counsels' "glaring blunder" in pleading a claim under the 5th Amendment. As Mr. Nakell explained in his post-oral argument filing, the claim was based on the theory that the unconstitutional approach to Jacobs through his family behind the back of his counsel violated Hatcher's 6th Amendment rights as well as Jacobs' because of the cooperative character of their defense. The claim was mistakenly grounded in the 5th Amendment instead of the 6th. This theory was correctly pleaded in paragraph 50 of the complaint. A129-30. The injury was real; the additional paragraph grounding it in the 5th Amendment was a mistake.

(C) The state defendants' violation of plaintiffs' First Amendment rights (First and Fourth Claims). The complaint alleged that pursuant to the conspiracy to repress the constitutionally protected petition drive for removal of the sheriff, the state defendants sought to and did frighten citizens away from participating in or cooperating with the petition drive. They did so principally through a sham investigation by the District Attorney and SBI of possible "conspiracy" and "obstruction of justice" charges in connection with the newspaper takeover.[9] A124-125.

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[9] The unconstitutional purpose of this "investigation" was manifested by the surrounding circumstances, including the following: (a) suspected supporters of Mr. Hatcher were asked about their association with Mr. Hatcher and about political activities related to the petition drive and were asked for membership lists, in interviews designed more to intimidate people from associating with Mr. Hatcher than obtain evidence; (b) the "conspiracy" issue had been investigated and rejected as baseless long

(continued...)

The record contains the affidavits of several non-plaintiffs, including a college security chief, a Chief of the Tuscarora Tribe, several retired school teachers, and a candidate for the District Attorney position - some of whom had been questioned about protected activities and associations - as well as affidavits of plaintiffs and counsel and other materials detailing the bases of the allegations.

Beyond referring to "standing prob-

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[9](...continued)
before the Federal trial of Hatcher and Jacobs; (c) defendant Britt and SBI agents made unusual public statements, some of them false or misleading, to create the impression that a major, wide-ranging investigation was underway; (d) defendant Britt's Witness Coordinator (defendant Sampson) told others that defendant Britt wanted to hurry the prosecution of Mr. Hatcher to "hush Mr. Hatcher up"; (e) there was a history of repression of political dissent in Robeson County; (f) there was sworn evidence from both a Robeson County Republican attorney and a former Assistant District Attorney of other instances of defendants' apparent use of the SBI agents as "political police". In fact, no criminal charges resulted from this "investigation".

lems" neither court discussed the factual or legal bases of these claims. A32, A84. The Court of Appeal's discussion of this matter consists of one opaque paragraph:

> On the claim that the prosecution chilled Hatcher and Jacobs' First Amendment expression, the complaint presented no facts showing specific harm or threat of harm, as required by Laird v. Tatum, 408 U.S. 1 (1972). Appellants respond that they did show concrete and specific harm insofar as plaintiffs' participation in the petition drive was curtailed. However, Hatcher and Jacobs' participation was not curtailed, and the district court's observation on their standing problem with respect to that claim is valid.

A32.

This is not a Laird v. Tatum "mere surveillance" case nor did plaintiffs only claim general chill. This case challenged "specifically identifiable Government violations" of rights, not "systemwide law enforcement practices" or "particular programs agencies establish to carry out their legal obligations." See, Allen v. Wright, 468 U.S. 737, 759-760 (1984).

As in Allee v. Medrano, 416 U.S. 802, 811-15 (1974), all plaintiffs alleged a specific plan to crush their First Amendment activities and specific action to do so, which concretely interfered with their activities. See Allee v. Medrano, supra ("potential supporters of their cause were placed in fear of lending their support").[10]

As to Hatcher and Jaçobs' standing, it is clear beyond doubt that allegations of injurious government action taken in retaliation for exercise of First Amendment rights sufficiently state a claim. Rankin v. McPherson, 483 U.S. 378 (1987); Mt. Healthy City School Dist. v. Doyle, 429

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[10] See also, Hobson v. Wilson, 737 F.2d 1, 27 (D.C. Cir. 1984) (supplying the public and/or news media with false information about Plaintiffs and their plans); ACLU v. City of Chicago, 431 F.Supp. 25, 27 (N.D. Ill. 1976); Angola v. Civiletti, 666 F.2d 1, 3-4 (2d Cir. 1981).

U.S. 274 (1977).[11]

Whether or not Hatcher and Jaccbs were subjectively chilled or totally prevented from participating, their rights were violated because potential supporters were effectively driven away. Numerous affidavits from plaintiffs and non-plaintiffs were presented to the district court establishing that people were chilled. Hatcher and Jacobs themselves suffered arrest and the threat of imprisonment. See, Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion of Brennan, J.)(- "The loss of First Amendment freedoms, for even minimal periods of time, unquestion-

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[11] See also, Newsom v. Morris, 888 F.2d 371, 378 (6th Cir. 1989) (intentional retaliation for exercise of constitutional right of expression constitutes ongoing irreparable injury); Rakovich v. Wade, 819 F.2d 1393 (7th Cir. 1987) (allegation of police investigation conducted with intention of retaliation for exercise of First Amendment rights states actionable claim without proof of actual damages).

ably constitutes injury.").

(D) Prefiling inquiry

A graphic example of the lack of integrity in the fact-finding process is both courts' manner of evaluating counsels' prefiling investigation.

The record details counsels' extensive prefiling inquiry.[12] Instead of looking at

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[12] Petitioner and Mr. Nakell sought information not only from clients but from a number of community leaders: e.g, a tribal chief, a college security chief, a newspaper editor, three school officials, several retired school teachers involved in the petition campaign, a former Assistant District Attorney and the Republican candidate for District Attorney. They spoke with many witnesses as events were unfolding.

Petitioner, seeking to confirm reports he was receiving about interference with counsel, found a "smoking gun" - the telephone tapes.

Mr. Nakell met with Agent Bowman and then-Assistant District Attorney Townsend, communicated with the Attorney General and Deputy Attorney General. During the federal prosecution he spoke with the Federal prosecutor and interviewed several state officials including the Governor's Chief of Staff. Both petitioner and Mr. Nakell had extensive knowledge of the circumstances

(continued...)

what counsel actually did and the information they had, both courts twisted one sentence in a memorandum to try to establish a point contrary to the evidence.

Agent Bowman was a key actor in the First and Sixth Amendment violations. Counsel sought expedited discovery in order to depose him to further support their request for immediate injunctive relief. The state defendants moved for a protective order, claiming plaintiffs wanted to depose Bowman to get discovery of the state's criminal case.

When the district court stayed discovery, counsel filed a memorandum in opposition to the state's motion for a protective order, in which they demonstrated that they had no need to use the Bowman deposition

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[12](...continued)
surrounding settlement of the takeover and the conduct of the subsequent prosecution.

for discovery for the criminal case because they already had all the discovery they needed through the federal prosecution.[13] Both courts inferred from one sentence in that memorandum that counsel "relied entirely upon discovery in the hope of finding some factual support for many of their claims" and said it indicated "an unacceptable level of prefiling investigation." A21-22, 86-87. That sentence said no such thing.[14] It simply emphasized that counsel

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[13] Over a month later the district court still had not ruled on the motion or scheduled a hearing. That failure of the case to advance was one significant circumstance that led to the decision to dismiss the complaint.

[14] "Plaintiffs anticipate that as a result of (deposing defendant Bowman) they will be in a position to apply to this court for temporary injunctive relief and make the showing required by Rule 65(b) of the Federal Rules of Civil Procedure. Plaintiffs should be permitted to pursue that standard course of action."

The district court responded to this by saying that "(i)t is not a standard course of action to file a complaint and then conduct discovery in the 'anticipation' that

(continued...)

sought the Bowman deposition for the purposes directly related to the claims in the lawsuit, and that the Bowman deposition would enable them to complete the evidence they already had so that they would be ready to apply for temporary injunctive relief.

Given the phone transcripts alone, demonstrating the solid basis for the Sixth Amendment claim and counsels' prefiling inquiry, the misreading and the conclusion drawn are inexplicable and clearly erroneous, if not disingenuous.

The Court of Appeals' only other reference to prefiling inquiry was to say that

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[14](...continued)
the complaint will prove warranted. ... such a course of action merits Rule 11 sanctions." A86-87.

The quantum of evidence necessary to support the filing of a complaint and that necessary to support a tactical decision to appear in court seeking a TRO are frequently different. The court treated them as always one and the same.

it did not excuse the "many clear factual errors" in the complaint. A25. The court said the "myriad inaccuracies" and "errors" were "egregious" and "pervade(d) the complaint." A19, 26. Yet both courts identified only one type of alleged mistake.

The alleged mistake involved plaintiffs' allegations that defendants Britt, Bowman and Sampson were agents of and/or made policy for Robeson County in a certain sphere and that defendant Britt was in a position to discipline, train or supervise sheriff's deputies. Both courts rejected these claims out of hand on the ground that all three were <u>state</u> employees. A18-19, A85. The Court of Appeals claimed that "the errors provide a false foundation for Appellants' allegation of a county-wide 'conspiracy,' and are central to

the complaint."[15] A19. That is wholly wrong, for three reasons:

(1) The complaint alleged no "county-wide 'conspiracy'" and the alleged "errors" about those specific defendants were not remotely central to the complaint or to the over-all liability of those individuals. The allegations related only to establishing county Monell liability for certain actions of these defendants.[16]

(2) The legal issue is not resolved by terming these individuals state employees. State officials can sometimes establish county policy for purposes of county liability under Monell. Pembaur v. Cincinnati, 475 U.S. 469, 484-85 (1986). The

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[15] The district court said that plaintiffs "misstate(d) numerous facts in an effort to implicate the defendants in a massive and sinister conspiracy." A84-85.

[16] The allegations were not necessary to hold Robeson County in as a defendant, because the County was liable for the other actions of the Sheriff's Department anyway.

Court of Appeals said this requires a provision of state law, A20, but Pembaur is broader than that; it looks at who de facto makes policy for the county, whether by explicit or implicit delegation. Id. at 483 n.12.

(3) The state statute cited by the Court of Appeals does not say that the District Attorney is a state official. It only says that the District Attorney prosecutes for his district, with districts being defined in terms of counties. See N.C.G.S. 7A-61, et seq.

II. The court materially distorted the law and counsels' demonstrated grasp of the law in holding that the claim for injunctive relief against the state prosecution (Sixth Claim) was not well grounded.

The claim for injunctive relief against the state criminal prosecution had two bases: (1) double jeopardy; and (2) "exceptional circumstances." While this claim was the only one given much atten-

tion by either court, neither court fairly set forth the legal or factual bases of even this claim. Both failed to consider the factual bases because of legal error.

(1) Double jeopardy. The sequence of events surrounding the takeover incident and the federal prosecution of Hatcher and Jacobs strongly suggested that state authorities were the moving force behind both the federal and state prosecutions. A high state official told Nakell that the state arranged the federal prosecution.

Appellants contended that the state prosecution was barred under the "tool of the same authorities" exception to the dual sovereignties exception to double jeopardy. See Bartkus v. Illinois, 359 U.S. 121, 123 (1959).

Both courts cited United States v. Liddy, 542 F.2d 76 (D.C. Cir. 1976), for the proposition that "that exception may

only be established by proof that State officials had little or no independent volition in their proceedings." Id. at 79. They rejected plaintiffs' claim out of hand without any consideration of the factual basis because the complaint alleged that the state controlled the state proceedings. A29, A81-82.

The Supreme Court has not limited the exception in such a fashion, and Liddy does not either. The statement quoted from Liddy is taken out of context. In context it addresses only the issue of the burden of proof faced by a party claiming that a state prosecution is a tool of the federal authorities, not the different question of whether the principle of Bartkus applies when the relationship of the two sovereigns is reversed.

The essence of Bartkus is that one sovereign may not avoid the double jeo-

pardy bar by using another sovereign to conduct one of the two trials, where prosecution by one is in fact a "sham and a cover" for prosecution by the other. Bartkus, 359 U.S. at 123-124. Plaintiffs' argument was a reasonable extension of the Bartkus principle to the situation where the state rather than the federal authorities are dominant. The Court of Appeals erred in not considering counsels' argument as a good faith argument for the extension of Bartkus.[17]

(2) "Exceptional circumstances" warranting Federal intervention: Younger v. Harris, 401 U.S. 37 (1971), permits injunctive intervention in a pending state

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[17] Mr. Pitts' and Mr. Nakell's understanding of the dual sovereignty and "tool of the same authorities" doctrines is clear from their letter to the Governor's Counsel, written well before suit was filed. Both courts ignored that letter and its significance as objective evidence that counsel were consciously arguing for extension or overruling of the law, as permitted by Rule 11.

prosecution "in certain exceptional circumstances:"

> -- where irreparable injury is 'both great and immediate,' ... or where there is a showing of 'bad faith, harassment, or other unusual circumstances that would call for equitable relief.'

Mitchum v. Foster, supra, 407 U.S. at 230.

Appellants argued that the state prosecution of Hatcher and Jacobs involved several "exceptional circumstances:" (a) it was integral to defendants' campaign to crush the petition drive; (b) it was a breach of the Governor's promise that Hatcher and Jacobs would not have to be in state custody; (c) the district attorney was using the prosecution to manipulate the Governor (who belonged to the opposing political party) into appointing his choice as successor; and (d) the defendants were interfering with plaintiff Jacobs' right to counsel and plaintiffs' joint defense.

The Court of Appeals refused as a mat-

ter of law to consider the evidence that the state prosecution was brought in bad faith to crush the petition drive:

> (P)laintiffs had no factual basis for claiming that the state prosecution was brought in bad faith, or without a reasonable expectation of conviction, because Hatcher and Jacobs had never denied taking hostages.

A31.

Appellants argued that two Courts of Appeal have held that the Younger "exceptional circumstances" include prosecutions "initiated to retaliate for or to discourage the exercise of constitutional rights," Lewellen v. Raff, 843 F.2d 1103, 1109 (8th Cir. 1988), and that in such prosecutions an injunction is justified "regardless of whether valid convictions conceivably could be obtained." Fitzgerald v. Peek, 636 F.2d 943, 945 (5th Cir. 1981); see also Wilson v. Thompson, 593 F.2d 1375, 1383 (5th Cir. 1979).

Both courts said that the Fourth Cir-

cuit had already rejected this proposition in Suggs v. Brannon, 804 F.2d 274 (4th Cir. 1986). A32-32, A83.

Suggs did not involve the situation here, where a state prosecution is used as part of a broader illegal effort to suppress protected political activity unrelated to the subject of the prosecution, and did not consider the 5th Circuit cases cited above, which preceded Suggs.

Suggs also did not present the other factors present here: the breach of the Governor's promise, the disruption of the defense, and the political use of the investigation and prosecution -- which plaintiffs here alleged combined to satisfy the "exceptional circumstances" standard as set out by the Supreme Court and other circuits.

Suggs relied on language in a footnote in Kugler v. Helfont, 421 U.S. 117, 126 n.6

(1975), that "bad faith in this context 'generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction.'" Suggs, supra, 804 F.2d 278 (emphasis added). The word "generally" leaves room for the kinds of "bad faith" circumstances present in this case but not in Suggs.[18]

Even if Suggs is controlling in the Fourth Circuit, and therefore in the Fourth Circuit "generally" means "always," Rule 11 by its own terms permits attorneys to challenge the law. Here counsel brought

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[18] In Kugler the Supreme Court said, in the text, that "Younger left room for federal equitable intervention in a state criminal trial ... where there exist other 'extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.'" Id., 421 U.S. at 124.

The Supreme Court also noted in Kugler that "(t)he scope of the exception ... for 'other extraordinary circumstances' has been left largely undefined by this Court." Id., 421 U.S. at 125 n.4.

an action in reliance on decisions of the Supreme Court and two other circuits - decisions which had not been considered by the Fourth Circuit.

III. The finding of improper purpose, based on credibility determinations made without an evidentiary hearing, when the court had never heard any witnesses or heard counsel argue, and no witness had been cross-examined, resulted from anti-civil rights bias and denied counsel due process.

The Fourth Circuit affirmed the district court's finding of improper purpose - made without an evidentiary hearing - because it was "not clearly erroneous" and it was supported by (1) the "baselessness" of the suit, and (2) "the cumulative nature of the evidence." A43, 38-39. It upheld the denial of a hearing for the same reasons, as it was "convince(d)" that the finding "would not have been altered by an evidentiary hearing." A44. There are at least three problems with this:

(1) The suit was well grounded in law

and fact, not "baseless." This itself requires reversal of the finding of improper purpose. It would contradict the weight of authority to hold that improper purpose alone can support sanctions for filing a complaint which is well-grounded in fact and law.[19]

The Supreme Court has consistently held that the First Amendment right to petition does not permit punishing an individual for filing a valid lawsuit for an improper

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[19] See, e.g., National Association of Government Employees v. National Federation of Federal Employees, 844 F.2d 216, 224 (5th Cir. 1988); Burkhart v. Kinsley Bank, 852 F.2d 512, 515 (10th Cir. 1988); Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1159 (9th Cir. 1987); Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986) ("Whatever the true purpose of the litigant, the vindication of voting rights secured by the fourteenth amendment cannot be deemed impermissible harassment."); contra, Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987).

purpose or motive.[20]

(2) The determination of improper purpose was heavily dependent on credibility determinations, as the Court itself recognized. A47-48. Due process does not permit a finding of improper purpose to be made without a hearing in the circumstances of this case, with credibility determinations and inferences of intent, purpose, and motive, as well as disputes of fact, drawn from sharply conflicting affidavits, where the court has no basis other than cold affidavits.[21] The Supreme Court has

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[20] Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138-139 (1961); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-511 (1972); Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 461 U.S. 731, 743 (1983).

[21] To say, as the Fourth Circuit did, that the district judge's extremely limited "participation" was "adequate," A48, is to debase the meaning of the words.

By the Court of Appeals' own criteria, based on Donaldson v. Clark, 819 F.2d 1551,

(continued...)

expressed serious reservations about "trial by affidavit" to determine credibility and motive.[22]

See also, Petition of Mr. Kunstler in this case.

(3) The determination of improper purpose was based totally on unsupported speculation, rejection of counsel's truthful, rational explanations, and inference from false premises.

For example, the district court said:

> Neal P. Rose, a New York District Attorney, has filed an affidavit ... stating that ... Mr. Pitts admitted

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[21](...continued)
1561 (11th Cir. 1987) and the Advisory Committee Note to Rule 11, an evidentiary hearing was required here. A43-44, 46-47.

[22] See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Our holding ... by no means authorizes trial on affidavits."); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 744-45 (1983) (NLRB may not conclude that lawsuit is "improperly motivated" if there is a "genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts").

> that the civil suit had been commenced as leverage and that it had no basis in fact.

A73-74. The district court's paraphrase of Rose is inflated and misleading. In Rose's affidavit he admitted that he was merely inferring petitioner's meaning.[23]

The district court said "the most damning evidence of all" was the "sudden and inexplicable" voluntary dismissal of the case. A76. The Court of Appeals uncritically repeated the district court's explanation:

> The district court dismissed as incredible appellants' explanations for dismissal, which contended that many of the claims had become moot through a series of events. The district court

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[23] The district court failed to mention that the record contained an opposing affidavit from another lawyer, who directly contradicted Rose's assertions and described Rose's overt animosity toward petitioner. The Court of Appeals ignored both the misleading nature of the paraphrase and the failure of the district court to acknowledge an opposing affidavit, or to justify crediting one affidavit over the other without a hearing.

> found it "absurd" to think that the wide-spread conspiracy involving high-level state and public officials had suddenly become unimportant by May 2, 1989. The court noted that the basis of the complaint - the breach of the alleged no-prosecution agreement - still existed even after Hatcher's and Jacobs' guilty pleas ....

A39-40 (citing A77). The no-prosecution promise was not "the basis of the complaint," and counsel did not allege that the allegations of interference with First Amendment activity and Sixth Amendment rights were "suddenly unimportant."[24]

What the district court did with evi-

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[24] As petitioner and Mr. Nakell explained in their affidavits, the decision to dismiss was very difficult because they knew they had evidence of violations of rights; yet the reality was that the particular circumstances which initially called for injunctive relief had objectively changed, precisely because the defendants' wrongful conduct had succeeded - while the suit was blocked in court - to the point where it was too late to prevent the harm that counsel were trying to prevent, and it made more sense to raise the remaining issues such as double jeopardy in the state criminal defense of Hatcher, as Mr. Nakell and Mr. Kunstler did.

dence in this case, and what the Court of Appeals countenanced,[25] is the methodology of the used car salesman and the politician's sound bite, not a federal court.

The "cumulative nature of the evidence" is nothing more than a collection of non-facts and sinister interpretations of innocent or at most ambiguous events, based on rejection of appellants' explanations (assuming their bad faith, which was the very thing to be proven), and outright

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[25] E.g., the district court asserted that petitioner was "cited" in Waller v. Butkovich, 584 F.Supp. 909 (M.D.N.C. 1984) for "misrepresentations concerning state law enforcement personnel." It accused petitioner of "employing" "similar tactic(s)" in this case of "misstat(ing) the duties and responsibilities of public officials ... to implicate them in a conspiracy." A84-85.

Not only was petitioner not "cited", but the record contains a letter from Judge Robert Merhige, the trial judge in Waller, complimenting petitioner's performance.

The Court of Appeals tried to distance itself from this blatant error without admitting it was an error or considering its implications for the lack of integrity of the district court's fact-finding. A19 n.1.

distortions of the evidence.

What is objective and indisputable in this case is that plaintiffs suffered certain constitutional injuries at the hands of at least some of the defendants, and that the complaint adequately pleaded that. No discussion of "improper purpose" that rejects that reality and begins with assumptions about the complaint being "frivolous and baseless" and uses that false premise to conclude improper motive can be defended as the basis for sanctioning these attorneys.

CONCLUSION

Discretionary review should be granted because two federal courts have materially distorted the factual record. They falsely condemned the three experienced civil rights lawyers for filing a meritorious suit to stop a campaign of law enforcement harassment and intimidation of Black and

Indian residents, despite an actual "smoking gun" implicating several defendants.

Conferences, law review articles and newspaper articles are already discussing how Rule 11 is disproportionately being used to punish civil rights attorneys.[26]

What was done here wronged petitioner, his co-counsel and their clients, and it undermined the express policy of making the Federal courts "the guardians of the people's federal rights." But it was worse than that.

No more elementary and fundamental breach of the rule of law could be imagined than the lack of integrity in the judicial fact-finding process in this case.

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[26] E.g., former Attorney General Ramsey Clark and NAACP Legal Defense Fund Director Julius Chambers. Christic Institute attorney Daniel Sheehan and two clients have been sanctioned for over one million dollars in an alteration of reality as transparent as the present case.

When there is "cheating" on the facts, law becomes meaningless and the judicial process becomes a shell game without a pea. Nor could rights more fundamental to democracy than freedom of association and freedom to petition for removal of a corrupt public official be violated. This is not the ultimate reliance on the judiciary established in Marbury v. Madison.

Explaining why both lower courts wrote misleading opinions is not petitioner's burden. But speaking the truth and attempting to redress fundamental constitutional deprivations is both a moral and professional imperative.[27] For this Court to

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[27] As Bartolomeo Vanzetti, of Sacco and Vanzetti, said at his sentencing:

> This is what I say: I would not wish to a dog or a snake, to the most low and misfortunate creature of the earth--I would not wish to any of them what I have had to suffer for things that I am not guilty of. But my conviction is that I have suffered for things that I am not guilty of. I am suffering because I am

(continued...)

condone such "cheating" by lower federal courts would reveal lack of moral and professional integrity.

For the sake of preserving our concept of "rule of law and not of men," this petition should be granted.

Respectfully submitted,

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(919) 929-0527

November 17, 1990

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[27](...continued)
a radical and indeed I am a radical; I have suffered because I was an Italian, and indeed I am an Italian; I have suffered more for my beloved than for myself; but I am so convinced to be right that if you could execute me two times, and if I could be reborn two other times, I would live again to do what I have done already.
Quoted in Douglas, The Court Years, 84.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2815

In Re: WILLIAM M. KUNSTLER; In Re: BARRY NAKELL; In Re: LEWIS PITTS,

Appellants,

ROBESON DEFENSE COMMITTEE; CARNELL LOCKLEAR; MARY SANDERSON; THELMA CLARK; ELEANOR JACOBS; BETTY MCKELLAR; EDDIE HATCHER; TIMOTHY BRYAN JACOBS,

versus

Plaintiffs,

JOE FREEMAN BRITT; RICHARD TOWNSEND; LEE SAMPSON; HUBERT STONE; LACY THORNBURG; ROBERT MORGAN; JAMES BOWMAN; SBI DOE, I; SBI DOE, II; SBI DOE, III; DEPUTY SHERIFF DOE, I; DEPUTY SHERIFF DOE, II; DEPUTY SHERIFF DOE, III; DEPUTY SHERIFF DOE, IV.; DEPUTY SHERIFF DOE, V; DA DOE, I; DA DOE, II; DA DOE, III; ROBESON COUNTY;,

Defendants - Appellees,

THE NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS; NORTH CAROLINA CIVIL LIBERTIES UNION; NORTH CAROLINA ACADEMY OF TRIAL LAWYERS; NATIONAL LAWYERS' GUILD, North Carolina Chapter,

Amici Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. Malcolm J. Howard, District Judge. (CA-89-6-3-CIV-H)

Argued: June 5, 1990
Decided: September 18, 1990

Before CHAPMAN, WILKINSON, and WILKINS, Circuit Judges.

Affirmed in part, vacated in part and remanded with instructions by published opinion. Judge Chapman wrote the opinion, in which Judge Wilkinson and Judge Wilkins joined.

ARGUED: Morton Stavis, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York, for Appellants. David Roy Blackwell, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. **ON BRIEF:** George Cochran, Law Center, University, Mississippi; Jerold Solovy, Laura Kaster, JENNER & BLOCK, Chicago, Illinois, for Appellants. Lacy H. Thornburg, Attorney General, James J. Coman, Senior Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina; Steven C. Lawrence, ANDERSON, BROADFOOT, JOHNSON & PITTMAN, Fayetteville, North Carolina, for Appellees. Jonathan D. Sasser, MOORE & VAN ALLEN, Durham, North Carolina; Martha A. Geer, SMITH, PATTERSON, FOLLIN, CURTIS,

JAMES, HARKAVY & LAWRENCE, Raleigh, North Carolina, for Amici Curiae North Carolina Civil Liberties Union, The North Carolina Academy of Trial Lawyers, and The North Carolina Association of Black Lawyers. J. Phillip Griffin, Jr., Durham, North Carolina; Sherri Zann Rosenthal, Durham, North Carolina; Katherine A. Hermes, Law Student, Durham, North Carolina, for Amicus Curiae North Carolina Chapter of the National Lawyers Guild. Daniel J. Popeo, Richard A. Samp, WASHINGTON LEGAL FOUNDATION, Washington, D.C., for Amici Curiae The Washington Legal Foundation, U.S. Senator Jesse Helms, U.S. Representatives Howard Coble and J. Alex McMillan, and The Allied Educational Foundation.

CHAPMAN, Circuit Judge:

Three attorneys appeal the award of Rule 11 sanctions against them in the amount of $122,834.28. Appellants were sanctioned following the dismissal of a 42 U.S.C. § 1983 action, in which they represented certain plaintiffs seeking monetary damages and injunctive relief from the Governor of North Carolina, a number of North Carolina district attorneys, a sheriff, certain State Bureau of Investigation officers, the State Attorney General and others for an

allegedly improper state criminal prosecution and harassment. We affirm in part, vacate in part, and remand with instructions.

I

The appellant attorneys are Barry Nakell, a professor at the University of North Carolina School of Law; Lewis Pitts, Director of the Christic Institute South, a public interest law firm in Carrboro, North Carolina; and William Kunstler, a nationally known civil rights attorney. The § 1983 action was connected with the appellants' earlier representation of two American Indians, Eddie Hatcher and Timothy Jacobs, in a federal criminal case.

On February 1, 1988, Hatcher and Jacobs staged an armed takeover of The Robesonian, a local newspaper in Robeson County, North Carolina. Hatcher and Jacobs held twenty hostages and charged the State District Attorney and the Sheriff's Office with corruption and criminal misconduct. Hatcher and Jacobs surrendered to federal authorities in exchange for a promise that a Governor's Task Force would investigate

their complaints. The Task Force ultimately announced that it had found no evidence to support Hatcher's and Jacobs' charges.

Hatcher and Jacobs were acquitted of federal criminal charges on October 14, 1988, but North Carolina District Attorney Joe Freeman Britt announced that Hatcher and Jacobs might face state indictments. Soon after that announcement, Hatcher began a petition drive seeking to have Hubert and Kevin Stone removed from the Sheriff's Office. The Robeson Defense Committee, which had supported Hatcher in his federal trial, supported the petition drive. In November 1988, newspaper reports indicated that the State Bureau of Investigation (SBI) was investigating whether there had been a conspiracy in the takeover of The Robesonian.

Appellants Barry Nakell and Lewis Pitts contacted the Attorney General's office to express their concern that SBI agents would intimidate citizens who were working with Hatcher in the petition drive. The Attorney General responded that no action would be taken by his office

because he did not believe that the SBI was engaged in any abuse of process. Attorney Nakell alleges that the Deputy Attorney General orally admitted that the decision was political.

Attorney Pitts volunteered legal assistance to anyone on the Robeson Defense Committee subjected to harassment because of their participation in the petition drive. Appellants allege that six members of the Defense Committee contacted Attorneys Pitts and Nakell with claims of harassment by SBI agents and the Sheriff's Department, primarily involving surveillance and questioning.

On December 6, 1988, Hatcher and Jacobs were indicted on state charges. After the indictment, Jacobs fought extradition from New York. Hatcher was in federal custody in California.

By late December 1988, appellants contend that they believed that Jacobs' extradition, the pending state prosecutions, and an alleged pattern of activity by the District Attorney and his staff, members of the Sheriff's Department, and the SBI raised

constitutional concerns which could only be resolved by a civil suit, because public officials were unresponsive. Appellants contend that they also believed that there was an illegal campaign to split Jacobs from Hatcher, and to interfere with Jacobs' right to counsel by persuading him to hire local counsel.

Attorneys Pitts and Nakell contend that they initially refrained from filing the complaint in hopes of enhancing Jacobs' plea bargaining opportunities, but Mr. Nakell filed the complaint on January 31, 1989, the eve of the one-year anniversary of the armed takeover of The Robesonian, and he called a press conference to announce the filing. An amended complaint, signed by all three appellants, was filed on March 16, 1989.

The suit named eight plaintiffs, including various members of the Robeson Defense Committee, and Jacobs and Hatcher. The thirty-page amended complaint names nineteen defendants, including two district attorneys and members of their staffs, five SBI agents, the SBI Director, the Sheriff of Robeson County and five

Deputy Sheriffs, the Attorney General of North Carolina, and the Governor of North Carolina. The complaint alleges First Amendment and Sixth Amendment violations concerning an alleged campaign of intimidation of political activity, and efforts to induce Jacobs to testify against Hatcher. All defendants were sued in their official and individual capacities, except the Governor, who was named only in his official capacity in a count seeking an injunction against extradition. The complaint also sought injunctions against the pending state criminal prosecutions, and against the defendants' harassment and interference with the attorney-client relationship established by Jacobs. The complaint sought damages against all individually named defendants and Robeson County.

After the case was filed, appellants sought expedited discovery to depose defendant SBI agent Bowman, who was the case agent in the state's pending criminal action against Jacobs and Hatcher. The defendants moved for a protective order claiming that discovery was improperly

sought to obtain information concerning the state criminal proceedings, which plaintiffs could not otherwise obtain. The district court did not rule on this motion prior to the dismissal of the case. In late March 1989, Jacobs, having failed in resisting extradition, was returned to North Carolina. In April, Jacobs agreed to a plea bargain. Appellants contend that a variety of events then caused them to reevaluate the viability of their civil suit, and to conclude that dismissal was appropriate.

On April 20, Mr. Nakell called Joan Byers, a Special Deputy Attorney General, seeking defendants' approval to a stipulated dismissal under Rule 41(a)(1)(ii). Byers would not stipulate to a dismissal under Rule 41(a)(1), but authorized appellants to state that defendants did not object to a dismissal under Rule 41(a)(2). Appellants proceeded under Rule 41(a)(2), and the order dismissing the case was entered on May 2, 1989.

On June 13, 1989, the state defendants filed their Rule 11 motion, and

the county defendants filed a similar motion for sanctions on July 5. On August 8, appellants responded to the Rule 11 motions and requested an evidentiary hearing. On September 5, appellants filed a Rule 11 motion seeking sanctions against the appellees. On September 8, the court heard arguments of counsel and shortly thereafter requested submissions by defendants' counsel of their fees and expenses. On September 29, the district court imposed Rule 11 sanctions upon appellants, and dismissed appellants' Rule 11 motion. Sanctions against appellants included full fees and costs of $92,834.28 and $10,000 additional sanctions against each appellant based upon the baseless claims which appellants had taken care to publicize. We affirm the district court's findings that appellants violated all three prongs of Rule 11, but vacate and remand for reconsideration of the appropriate sanction.

II

SANCTIONS AFTER DISMISSAL

Initially, we must determine whether the defendants' failure to notify the

plaintiffs or the court prior to dismissal that defendants intended to file a Rule 11 motion should have precluded consideration of the Rule 11 motion. Appellants cite Barr Labs., Inc. v. Abbott Labs., 867 F.2d 743 (2d Cir. 1989), where the Second Circuit affirmed the denial of a Rule 11 motion filed after a stipulated dismissal under Rule 41(a)(1)(ii). There, the defendant's attorney did not indicate an intention to seek Rule 11 sanctions prior to dismissal and implied in a letter to plaintiff's counsel, prior to the dismissal, that sanctions would not be sought if the case were voluntarily dismissed. The Barr court enunciated a rule "prohibit[ing] a motion for Rule 11 sanctions after the execution of a stipulation of dismissal without a reservation of the right to move for such relief." 867 F.2d at 748.

The present case is different from Barr because it does not involve a stipulated dismissal, which requires opposing counsel to sign the dismissal order. We have a dismissal under Rule 41(a)(2), which does not require a

stipulation by the defendants. No court has adopted a rule prohibiting a motion for Rule 11 sanctions after a dismissal with prejudice under Rule 41(a)(2). In addition, unlike Barr, there is no evidence that defendants indicated that they would not pursue Rule 11 sanctions. We decline to extend Barr to dismissals under Rule 41(a)(2).

Appellants also argue that since Rule 41(a)(2) specifies that dismissal is subject to such "terms and conditions as the court deems proper," the potential for Rule 11 sanctions should be stated by a defendant as a condition to a dismissal. We disagree. Rule 41(a)(2) does not require the defendant or a court to indicate the possibility of Rule 11 sanctions as a "term or condition" of a plaintiff's dismissal. Recently, in Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2456 (1990), the Supreme Court hypothesized that even a Rule 11 sanction which prohibited refiling a complaint dismissed without prejudice under Rule 41(a)(1) would not be a "term or condition" placed upon the dismissal.

Waiver of a Rule 11 motion may not be a condition to dismissal because a decision not to dismiss may not prevent the imposition of sanctions for an improvidently filed complaint. "As the 'violation of Rule 11 is complete when the paper is filed,' a voluntary dismissal does not expunge the Rule 11 violation." Id. at 2455 (quoting Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077 (7th Cir. 1987), cert dismissed, 485 U.S. 901 (1988)).

There may be circumstances under which Rule 11 sanctions should not be granted after the voluntary dismissal of a case, i.e., a defendant has indicated an intent not to pursue sanctions, or the motion is filed an inordinately long time after the dismissal. "Although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate there would be a lengthy delay prior to their imposition." Hartmarx Corp., 110 S. Ct. at 2457. However, these considerations are equitable, and must be resolved on a case by case analysis. The party seeking

sanctions may avoid such problems by notifying his opponent and the court of his intention to pursue sanctions at the earliest possible date.

As the Supreme Court has recently confirmed, there is no jurisdictional bar to the imposition of sanctions after a voluntary dismissal.

> In order to comply with Rule 11's requirement that a court "shall" impose sanctions "[i]f a pleading, motion, or other paper is signed in violation of this rule," a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action.

Hartmarx Corp., 110 S. Ct. at 2455. "[T]he only time limitation . . . [in filing Rule 11] arises out of . . . equitable considerations." Hicks v. Southern Maryland Health Systems Agency, 805 F.2d 1165, 1167 (4th Cir. 1986). The defendants filed their motion six weeks after the Rule 41(a)(2) dismissal, the appellants were not prejudiced by appellees' delay in filing, and the district court's consideration of the motion was proper.

III

VIOLATIONS OF RULE 11

Rule 11 states, in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The district court found that the three appellants violated all three prongs of Rule 11 by failing to make a reasonable inquiry to determine that complaint stood well grounded in fact and warranted by

existing law, and by filing the complaint for an improper purpose. We review all aspects of the district court's Rule 11 determinations under an abuse-of-discretion standard. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. at 2460; Stevens v. Lawyers Mut. Liab. Ins. Co. of North Carolina, 789 F.2d 1056, 1060 (4th Cir. 1986).

A. Mr. Kunstler's Liability

Before reviewing the specific violations of Rule 11 found by the district court, we note that Mr. Kunstler's affidavit states that he "did not actively participate in the instant litigation, relying on Prof. Barry Mr. Nakell, who was on the scene, to prepare and file it." (Emphasis added.) The district court stated that "[i]n light of the serious allegations in the complaint, Mr. Kunstler's total reliance on other counsel is itself a violation of Rule 11." This finding is supported by a recent pronouncement of the Supreme Court. Mr. Kunstler's reliance on others was indeed an improper delegation of his responsibility under Rule 11 to certify

that the pleading filed over his name was well grounded in fact and in law.

> The signing attorney cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment.

Pavelic & LeFlore v. Marvel Entertainment Group, 110 S.Ct. 456, 459 (1989). "[T]he purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility." Id. at 460. Having failed in his responsibility, Mr. Kunstler may not now be heard to protest that he does not share in any violations of Rule 11 which are evident on the face of the complaint.

B. Well Grounded in Fact

The district court based sanctions in part on a violation of the first prong of Rule 11 - finding that the complaint was not well grounded in fact. An objective test is used "to determine the reasonableness of a lawyer's prefiling investigation." Stevens, supra, 789 F.2d

at 1060. "Blind reliance on the client is seldom a sufficient inquiry." Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986). Mr. Nakell and Mr. Pitts have argued that they had "an intimate knowledge of the county and its people; factors which made them . . . professionally capable of assimilating and weighing the facts gathered prior to filing the civil suit." In light of that knowledge, the factual inaccuracies in the complaint are even more egregious.

The district court noted numerous misstatements of fact, such as the assertion that the district attorney "serves as the criminal prosecution arm of Defendant Robeson County and as such makes policy in police investigation and criminal prosecution matters for Defendant Robeson County." In fact, N.C.G.S. §§ 7A-61 et seq. indicates that the District Attorney is an officer of the state, not an agent nor an employee of the county. Contrary to the complaint, defendants Britt, Townsend, and Sampson, and the District Attorney's staff, are state officers, not agents or employees of

Robeson County.[1] The complaint alleges that District Attorney Britt refused and failed to discipline, train and supervise the Sheriff's deputies "under their control and supervision." District Attorneys possess no such power or responsibility.

Appellants acknowledge some errors, but contend they are "isolated" and thus do not warrant sanctions. We do not agree with this characterization. The errors pervade the complaint and concern information which either was or should have been known to appellants. The errors provide a false foundation for appellants' allegation of a county-wide "conspiracy," and are central to the complaint. Appellants also suggest that, under Pembaur v. Cincinnati, 475 U.S. 469, 484-85 (1986), state officials can

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[1]Although the district court noted that appellant Pitts appeared to make similar misstatements in Waller v. Butkovich, 584 F. Supp. 909, 935 n.5 (M.D.N.C. 1984), it does not appear that counsel was sanctioned in that case, and we do not consider Pitts' conduct in Waller in affirming the award of sanctions in this case.

sometimes establish county policy for purposes of § 1983 liability. Unlike Pembaur, there is no provision of North Carolina law which suggests that the state officials in this case either could or did act to establish county policy.

Other causes of action were founded on allegations which utterly lacked any basis in fact. For example, the complaint alleged that the Governor, the Attorney General and District Attorney entered into a "no state prosecution" agreement, and this agreement was breached when the state prosecution commenced. The district court found that prior to filing their complaint, appellants

> had access to the transcript of the negotiations leading to the hostage release agreement as well as a copy of the written agreement. Nothing in the agreement . . . or in any of the negotiations, suggests an agreement that Hatcher and Jacobs would not face North Carolina charges, and none of the negotiators had the authority to so agree.

Moreover, North Carolina law does not grant the Governor or the State Attorney General the power to bind the state not to

prosecute. Neither the Attorney General nor District Attorney Britt played any role in the hostage negotiations, but appellants now argue that unspecified evidence, obtainable through discovery, "could show" that a no prosecution agreement was made. While a lawyer may rely on discovery to reveal additional facts to support claims which are well grounded in fact, Rule 11 sanctions are appropriate when a lawyer attempts to use discovery to support outrageous and frivolous claims for which there is no factual support. Unsubstantiated claims such as these constitute an abuse of the judicial process for which Rule 11 sanctions were designed.

Appellants appear to have relied entirely upon discovery in the hope of finding some factual support for many of their claims. In their Memorandum and Opposition to Defendants' Motion for a Protective Order, appellants wrote:

> Plaintiffs anticipate that as a result of [deposing SBI defendant Bowman] they will be in a position to apply to the Court for temporary injunctive relief and make the

> showing required by Rule 65(b) of the Federal Rules of Civil Procedure.

Appellants requested a temporary restraining order in their complaint. Rule 65(b) makes clear that a temporary restraining order may be granted only if

> it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.

Rule 65(b) does not authorize counsel to request relief and then search through discovery for facts to support the relief already requested. The rule requires that "specific facts" be "shown" to the court with the request for relief. We agree with the district court that the appellants' request for relief and their indication that they were not "in a position to make the showing required by Rule 65(b)" without later discovery indicates an unacceptable level of pre-filing investigation.

We affirm the district court's findings that many of the allegations

against state and local officials "have nothing to do with this case . . . and are factually unsubstantiated." Allegations which suggest that the Sheriff is engaged in drug trafficking and that a black inmate died while in the Sheriff's custody are irrelevant. These allegations involve no injury to the plaintiffs, and the report of drug trafficking by the Sheriff's Office is wholly unsupported in fact. Appellants protest that these allegations were represented in the complaint only as beliefs of their clients, but this does not make them relevant to the complaint or less scandalous in nature. While irrelevant allegations, standing alone, may not be cause for Rule 11 sanctions, the existence of numerous irrelevant, unsubstantiated, and sensational allegations is an appropriate factor for a district court to consider in determining whether the pleading as a whole lacks adequate factual foundation.

In this case, the complaint was filled with irrelevant allegations not tied to specific injuries to plaintiffs,

i.e., general allegations of abusive behavior against blacks and Indians, and allegations that Robeson County is beleaguered by poverty, illiteracy, and violence. There was little basis for the allegation that Britt, Townsend, Thornburg and Morgan conspired to appoint Townsend as District Attorney and to use SBI agents as political police to discredit the Republican candidate, and that allegation was again irrelevant. Hatcher and Jacobs had been indicted prior to Townsend's appointment, and none of the other candidates for District Attorney suggested that they would not continue the prosecution. Appellants' arguments as to the relevance of such allegations are tangential at best and often strain credulity.

Although Mr. Nakell and Mr. Pitts filed lengthy affidavits detailing their factual inquiry, such affidavits do not provide factual or legal support for the inaccuracies noted by the district court. The number of hours allegedly spent by counsel in prefiling investigation does not dissuade us from affirming the

district court's findings of Rule 11 violations. Given the adequate time to prepare and hours allegedly spent in preparation of the complaint, appellants have presented no excuse for the many clear factual errors in this pleading.

Appellants have argued that, despite the lack of pre-filing foundation for their claims, it was appropriate to include the claims because support for them could only be obtained through discovery. In Kraemer v. Grant County, 892 F.2d 686 (7th Cir. 1990), the court held that sanctions were not warranted where an attorney relied on client information to support a cause of action based on a theory of conspiracy, even though additional facts were needed to prove the claim. "If discovery is necessary to establish a claim, then it is not unreasonable to file a complaint so as to obtain the right to conduct that discovery." 892 F.2d at 690. Despite this sweeping statement, there were in Kraemer a number of factors cautioning against sanctions which are not present here. In Kraemer, the attorney was a recent law

school graduate, and had hired a private investigator to look into his client's allegations. The investigator's report did not discredit any part of the client's story and the prospective defendants refused to cooperate with the investigator. Only a single portion of the complaint - that dealing with the proof of state action - was ultimately found to be without support.

In the present case, appellants are experienced attorneys with both the time and the means to conduct a responsible factual investigation. The complaint contains myriad inaccuracies rather than a single error. Many of the factual inaccuracies could have been discovered by the most cursory investigation. The irrelevances are inexcusable considering the attorneys' experience. Indeed, it is remarkable that so many errors could have been undetected by appellants. The number of claims without factual foundation warrants sanctions, whether the errors stem from incompetency or wilful misconduct.

The need for discovery to complete

the factual basis for alleged claims is not an excuse to allege claims with no factual basis. While we do not disagree with the result obtained in Kraemer, we find that it is not applicable to the present case. A lawyer is an officer of the court, and he should never file a lawsuit without confidence that it has a reasonable basis in fact and is well grounded in law. For the purposes of Rule 11, the factual inquiry necessary to file a complaint is generally satisfied if all of the information which can be obtained prior to suit supports the allegations made, even though further facts must be obtained through discovery to finally prove the claim. However, a complaint containing allegations unsupported by any information obtained prior to filing, or allegations based on information which minimal factual inquiry would disprove, will subject the author to sanctions.

C. Well Grounded In Law

The district court found that the complaint was not well grounded in law. We agree. Appellants contend that the strength of the legal basis of the

complaint is demonstrated by their opponent's lengthy response to them, and the approval of a civil rights attorney, who reviewed and approved of, but did not sign, the complaint. The length of an opponent's response to a complaint does not validate the otherwise insubstantial claims therein, because a lengthy response may reveal less the merit of particular claims than the number of valid defenses to them. An opponent may have employed "scorched earth" tactics in composing a response far beyond what is required to oppose frivolous claims. Nor is the Rule 11 standard of whether a "reasonable attorney in like circumstances would believe his actions to be factually and legally justified" satisfied merely by having another attorney review a complaint. The reviewing attorney may be unfamiliar with the true facts of the case, the factual and legal investigation conducted, or the law relevant to the complaint.

The district court enumerated several substantial claims without legal foundation. The court found no factual or

legal basis for the double jeopardy claim to the state prosecution of Hatcher and Jacobs following the federal prosecution, because a subsequent prosecution by a different sovereign plainly does not constitute double jeopardy. See Heath v. Alabama, 474 U.S. 82, 106 S. Ct. 433 (1985). Although a "tool of the same authorities" exception is possible in some circumstances, see Bartkus v. Illinois, 359 U.S. 121 (1959), that exception may only be established by proof that State officials had little or no independent volition in their proceedings. See United States v. Liddy, 542 F.2d 76, 79 (D.C. Cir. 1976). In this case, however, the complaint alleged that the state officials instituted and controlled the state proceeding, which precludes the establishment of that exception. The district court also considered a quotation attributed to Mr. Pitts in a newspaper article that the state charges did not constitute double jeopardy. Although we caution the court against relying too heavily on press reports, we do not fault the district court for considering the

statement.[2]

The district court found without legal foundation the plaintiffs' claim that Hatcher's Fifth Amendment rights were damaged when the state tried to extract testimony from Jacobs. Fifth Amendment protection is personal to the individual whose testimony is being compelled and appellants as experienced attorneys should have been well aware of this. Moran v. Burbine, 475 U.S. 412, 433 (1986). Appellants make no attempt to explain away this glaring blunder.

Appellants sought to enjoin state criminal proceedings, but the district

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[2]Pitts has never denied making the statement. If an attorney states that a particular claim is groundless, then that statement is strong evidence for the imposition of Rule 11 sanctions. However, a statement reported in the press should never be the basis for sanctions; rather, to be a basis for sanctions, the statement should appear either in an affidavit, in other reliable testimony, or in a statement by counsel in court. In this case, the reported statement was that the state charges did not "technically" constitute double jeopardy.

court found that the Younger v. Harris abstention doctrine clearly barred such relief. See Younger v. Harris, 401 U.S. 37 (1971). The court also found that Hatcher and Jacobs could have presented their federal constitutional claims to the state court. We agree that plaintiffs had no factual basis for claiming that the state prosecution was brought in bad faith, or without a reasonable expectation of conviction, because Hatcher and Jacobs had never denied taking hostages. Although appellants cite an Eighth Circuit case which suggests that the Younger abstention doctrine does not apply if "a prosecution was brought in retaliation for or to discourage the exercise of constitutional rights . . . 'regardless of whether valid convictions conceivably could be obtained,'" Lewellen v. Raff, 843 F.2d 1103, 1109-10 (8th Cir. 1988), cert. denied, 109 S. Ct. 1171 (1989), that proposition has been rejected by this court. In Suggs v. Brannon, 804 F.2d 274 (4th Cir. 1986), we upheld the use of the Younger abstention doctrine when plaintiffs claimed that their prosecution

under obscenity laws chilled their First Amendment rights.

The district court also noted "serious standing problems with many of the plaintiffs' claims." For example, on the claim that the prosecution chilled Hatcher and Jacobs' First Amendment expression, the complaint presented no facts showing specific harm or threat of harm, as required by Laird v. Tatum, 408 U.S. 1 (1972). Appellants respond that they did show concrete and specific harm insofar as plaintiffs' participation in the petition drive was curtailed. However, Hatcher and Jacob's participation was not curtailed, and the district court's observation on their standing problem with respect to that claim is valid.

We therefore affirm the court's findings that the complaint on the whole was not well grounded in law.

D. Improper Purpose

Sanctions could have been imposed for the violations already discussed, but the district court also based the award of sanctions on appellants' improper purpose in filing the complaint. The type and

number of Rule 11 violations are considered in determining the appropriate sanction, and it was proper for the district court to consider appellants' purpose. Although the district court first discussed "improper purpose" under Rule 11, whether or not a pleading has a foundation in fact or is well grounded in law will often influence the determination of the signer's purpose, and we suggest that a district court should consider the first two prongs of Rule 11 before making a determination of improper purpose.

Appellants argue that the district court's conclusions as to their purpose are clearly erroneous, because there is no evidence in the record to support the court's findings, or the findings are based on factual conclusions which were contested by affidavit. The district court concluded that sanctions would be appropriate based on the improper purpose of the lawsuit "[e]ven if the complaint had a proper legal and factual basis." Since we have affirmed the court's findings that the complaint in the instant case was not well grounded in law or in

fact, we need not decide whether a complaint which is well grounded in law and in fact can be sanctioned solely on the basis that it was filed for an improper purpose. Rather, we look only to whether the court abused its discretion in finding that the complaint was filed for an improper purpose. But see Cohen v. Virginia Elec. and Power Co., 788 F.2d 247 (4th Cir. 1986) (A finding of improper purpose was appropriate where plaintiff had a preconceived plan to withdraw a motion, which was otherwise legally and factually supportable, if the opposing party resisted).

Rule 11 defines the term "improper purpose" to include factors "such as to harass or to cause unnecessary delay or needless increase in the costs of litigation." The factors mentioned in the rule are not exclusive. If a complaint is not filed to vindicate rights in court, its purpose must be improper. However, if a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve,

so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose. Thus, the purpose to vindicate rights in court must be central and sincere. Filing of excessive motions may sometimes constitute "harassment" under the rule even if the motions are well grounded. See Aetna Life Ins. Co. v. Alla Medical Serv., Inc., 855 F.2d 1470, 1476 (9th Cir. 1988). Likewise, filing a motion or pleading without a sincere intent to pursue it will garner sanctions. See Cohen, supra.

We have previously stated that in order to determine "improper purpose," a district court must judge the conduct of counsel under an objective standard of reasonableness rather than assessing subjective intent. Stevens v. Lawyers Mut. Liab. Ins. Co. of North Carolina, 789 F.2d 1056, 1060 (4th Cir. 1986); Fahrenz v. Meadow Farm Partnership, 850 F.2d 207, 210 (4th Cir. 1988). This test was derived from Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986), where it was stated that "[h]arrassment under Rule

11 focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent." In other words, it is not enough that the injured party subjectively believes that a lawsuit was brought to harass, or to focus negative publicity on the injured party; instead, such improper purposes must be derived from the motive of the signer in pursuing the suit. An opponent in a lawsuit, particularly a defendant, will nearly always subjectively feel that the lawsuit was brought for less than proper purposes; plaintiffs and defendants are not often on congenial terms at the time a suit is brought. However, a court must ignore evidence of the injured party's subjective beliefs and look for more objective evidence of the signer's purpose.

There is some paradox involved in this analysis, because it is appropriate to consider the signer's subjective beliefs to determine the signer's purpose in filing suit, if such beliefs are revealed through an admission that the

signer knew that the motion or pleading was baseless but filed it nonetheless. This evidence may be said to be "objective" in the sense that it can be viewed by a court without fear of misinterpretation; it does not involve difficult determinations of credibility. Circumstantial facts surrounding the filing may also be considered as evidence of the signer's purpose. Repeated filings, the outrageous nature of the claims made, or a signer's experience in a particular area of law, under which baseless claims have been made, are all appropriate indicators of an improper purpose.

> The district court concluded that plaintiffs' counsel never intended to litigate this § 1983 action and that counsel filed it for publicity, to embarrass state and county officials, to use as leverage in criminal proceedings, to obtain discovery for use in criminal proceedings, and to intimidate those involved in the prosecution of Hatcher and Jacobs.

The court drew its conclusions without the aid of an evidentiary hearing, but relied upon the evidence before it. The court's first conclusion, that counsel

never intended to litigate the action, is the one which most clearly supports sanctions based on a finding of improper purpose. The fact that so many allegations in the complaint lacked a basis in law or in fact strongly supports the court's finding of improper purpose. The existence of baseless allegations does not alone require a finding of improper purpose, because inexperience or incompetence may have caused their inclusion in a pleading, rather than or in addition to willfulness or deliberate choice. See Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987). However, in this case counsel are clearly not inexperienced, and the number and magnitude of claims without foundation suggests that incompetence is not the cause for such allegations in the complaint. This court is left with the conclusion, drawn by the district court, that counsel wilfully included the baseless claims. If counsel wilfully files a baseless complaint, a court may properly infer that it was filed either for purposes of harassment, or some purpose other than to vindicate rights through the

judicial process. We therefore affirm the district court's finding that appellants violated the improper purpose prong of Rule 11.

In addition to relying upon the complaint itself, the district court inferred an improper purpose from the timing of the filing of the complaint, on the eve of the anniversary of the takeover of The Robesonian, and some time after the alleged constitutional violations began. The court also viewed with suspicion the timing and nature of the dismissal of the complaint, which occurred after Jacobs lost his extradition fight in the criminal case, and before any significant discovery might have given notice to the plaintiffs that their claims were not valid. The district court dismissed as incredible appellants' explanations for dismissal, which contended that many of the claims had become moot through a series of events. The district court found it "absurd" to think that the wide-spread conspiracy involving high-level state and public officials had suddenly become unimportant by May 2, 1989. The court

noted that the basis of the complaint - the breach of the alleged no-prosecution agreement - still existed even after Hatcher's and Jacobs' guilty pleas to the state charges. The court stated that the double jeopardy claims, damage claims, and other requests for equitable relief, if ever valid, did not cease being valid. In finding improper purpose, the district court was also influenced by the outrageous nature of the claims made.

The affidavits submitted by counsel strongly disputed the court's conclusions as to the timing of the filing and of the dismissal of the suit, and claimed that no improper motive influenced the timing of events. As to the decision to dismiss, appellants argued that it was based solely on financial considerations and the necessity of devoting professional resources elsewhere. Appellants argue that many equitable claims had become moot, and that the prospect for damages on the remaining claims did not warrant the expense of continuing the suit. However, the district court's determination that these explanations are not reasonable or

believable, in light of all of the evidence surrounding the filing of the complaint and the frivolousness nature of the allegations made, is not clearly erroneous.

The district court noted other evidence which suggested that appellants' purpose in filing the complaint was not to vindicate plaintiffs' rights, such as appellants sending a copy of the complaint to the state judge who likely would have tried Hatcher and Jacobs in the criminal case. The court also noted a quotation reported by the media, in which Mr. Pitts allegedly suggested that the suit was dropped after the Attorney General's office showed strong opposition to the suit. The court further considered an affidavit by New York attorney Neal Rose concerning Mr. Pitts' alleged admission that the suit was commenced as leverage and lacked a factual basis, although that affidavit was contradicted by an affidavit by attorney Alan Rosenthal. In light of other evidence which supports the court's finding of improper purpose, we cannot say that it was an abuse of discretion for the

court to consider these matters as additional support, even though determinations of credibility are best made after an evidentiary hearing.

In concluding that appellants had never intended to litigate their suit, the district court also concluded that circumstances surrounding the case, when viewed as a whole, supported the conclusion that appellants' primary motives in filing the complaint were to gain publicity, to embarrass state and county officials, to gain leverage in criminal proceedings, to obtain discovery for use in criminal proceedings, and to intimidate those involved in the prosecution of Hatcher and Jacobs. At least some of these motives would not warrant sanctions under the improper purpose portion of Rule 11, if appellants' central purpose in bringing suit had been to vindicate rights of the plaintiffs. Holding a press conference to announce a lawsuit, while perhaps in poor taste, is not grounds for a Rule 11 sanction, nor is a subjective hope by a plaintiff that a lawsuit will embarrass or upset a

defendant, so long as there is evidence that a plaintiff's central purpose in filing a complaint was to vindicate rights through the judicial process. In this case, however, there was no proper purpose for appellants' filing of the suit, and the district court's consideration of other possible motives for the suit based on the evidence available was proper.

We have affirmed the district court's conclusion that sanctions were warranted based on the improper purpose prong of Rule 11 because it is not clearly erroneous and is supported by facts such as the baseless allegations made, appellants' legal experience, and the cumulative nature of the evidence. However, we urge district courts to exercise special caution when evaluating a signer's purpose under Rule 11. When there are issues of credibility, disputed questions of fact, and rational explanations of purpose given, an evidentiary hearing may well be necessary to resolve the issues. This is particularly true when large sanctions are being considered on the ground of improper

purpose as well as failure to comply with the first two prongs of Rule 11. We do not find that the court erred in failing to hold an evidentiary hearing in this case, because the cumulative nature of the evidence, as well as our earlier findings on the frivolousness of the allegations made in the complaint and the lack of a legal or factual basis, convinces us that the court's finding of improper purpose is not clearly erroneous and would not have been altered by an evidentiary hearing.

IV

DUE PROCESS

Appellants argue that the district court should not have found a violation of the "improper purpose" prong of Rule 11 without holding an evidentiary hearing. We disagree. Due process does not require an evidentiary hearing before sanctions are imposed, even when sanctions are imposed in part under the improper purpose prong of Rule 11. The Advisory Committee Note on Rule 11, 28 U.S.C. App., pp. 575-76, indicates that satellite litigation over sanctions and separate hearings should be limited to the extent possible. "[T]he

court must to the extent possible limit the scope of the sanction proceedings to the record."

Appellants cite two Seventh Circuit cases which suggest that a hearing should be held where sanctions are based on a signer's "bad faith." See Brown v. Nat'l Bd. of Medical Examiners, 800 F.2d 168, 173 (7th Cir. 1986); Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 206 (7th Cir. 1985).[3] We are not persuaded by the scant reasoning of these cases that a hearing is required whenever improper purpose is found under Rule 11. Appellants also cite INVST Financial Group., Inc. v. Chem-Nuclear Systems., Inc., 815 F.2d 391, 405 (6th Cir.), cert. denied, 108 S. Ct. 291 (1987). Although it cites Rodgers, Chem-Nuclear Systems does not support

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[3]Brown cites only Rodgers for the proposition. Rodgers itself relies on Textor v. Board of Regents of Northern Illinois University, 711 F.2d 1387 (7th Cir. 1983), a case which is based not on the current Rule 11, which relies on an objective standard of reasonableness, but on a wholly subjective test.

appellants' proposition. Instead, the court simply notes that

> no hearing is required where an attorney is sanctioned for filing frivolous motions ungrounded in law or fact, and where the judge imposing sanctions has participated in the proceedings. These are the circumstances in [this] case.

Id. Counsel was also sanctioned in that case for filing motions for an improper purpose.

In determining whether and to what extent a hearing is required prior to the imposition of sanctions, we are guided by the Advisory Committee Note to Rule 11 and the reasoning of Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987):

> The Advisory Committee Note indicates some of the matters to be considered: (1) the circumstances in general; (2) the type and severity of the sanction under consideration; and (3) the judge's participation in the proceedings, the judge's knowledge of the facts, and whether there is need for further inquiry. The Advisory Committee Note observes that "[i]n many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

> When an attorney has failed to present necessary factual support for claims despite several opportunities to do so, for example, further hearing on the sanctions issue may well be not only unnecessary but also a waste of judicial resources. On the other hand, when a court is asked to resolve an issue of credibility or to determine whether a good faith argument can be made for the legal position taken, the risk of an erroneous imposition of sanctions under limited procedures and the probable value of additional hearing are likely to be greater. Prior opportunities to respond to Rule 11 charges will also influence the extent to which further hearing is necessary.
>
> As mentioned by the Advisory Committee, the type and severity of the sanction are necessary elements in the calculus. The more serious the possible sanction both in absolute size and in relation to actual expenditures, the more process that will be due.

(Footnote omitted.)

Even if an evidentiary hearing is not required in every "improper purpose" case, appellants argue that such hearing was required in this case. Although the number of credibility determinations which the

court made without an evidentiary hearing should have suggested to the court that an evidentiary hearing would have been of value, we affirm the court's findings that appellants violated all three prongs of Rule 11 because the findings are not clearly erroneous even excluding some evidence of "improper motive" which appellants contested.

The district judge's participation in the proceedings was adequate to give him full knowledge of the relevant facts without the necessity of an evidentiary hearing. The district court had before it the pleadings, the summary judgment motions of the state defendants and the 12(b) motion of the county defendants. We also find that counsel were given an adequate opportunity to contest the court's determinations that Rule 11 was violated. The district court allowed appellants to submit affidavits, and voluminous written legal arguments. The district judge also heard oral argument. We find that due process requirements were satisfied by the opportunities appellants were given to respond to the charges that

their complaint violated Rule 11.

However, although we find that counsel had an adequate opportunity to contest the court's finding that Rule 11 was violated, we find that appellants were not given an adequate opportunity to respond to the type and amount of sanction imposed, particularly in light of the large monetary sanction. Appellants were given no opportunity to contest the fee statements submitted, and the amount of the sanction was largely the result of those statements. Under the facts of this case, particularly the amount of the sanction, due process requires that appellants have some opportunity to contest the amount of the sanction imposed. We therefore vacate the sanction imposed. As discussed below, we vacate the type and amount of sanction chosen by the district court for certain additional reasons. On remand, under the guidelines set forth below the appellants will be given an appropriate opportunity to respond to the type and the amount of the sanction.

V

AMOUNT OF SANCTION

A. Attorney Fees Portion

Rule 11 requires that "an appropriate sanction" be imposed upon those who violate its requirements. Appellants argue that the amount of sanctions was inappropriate, in part because the district court used the Rule to shift fees and compensate the defendants, rather than to deter improper litigation. We agree and vacate the amount of the monetary sanction.

We have previously held that the least severe sanction adequate to serve the purposes of Rule 11 should be imposed. Cabell v. Petty, 810 F.2d 463, 466 (1987). It is clear that Rule 11 should not blindly be used to shift fees. In this instance, it appears that the district court erred in assuming that "[t]he first purpose of sanctions under Rule 11 is to compensate the offended parties." In establishing the amount of the sanction, the district court improperly focused on providing "compensatory sanctions." The amount of expense borne by opposing counsel in combatting frivolous claims may

well be an appropriate factor for a district court to consider in determining whether a monetary sanction should issue and if so, in what amount. However, it is clear that the primary, or "first" purpose of Rule 11 is to deter future litigation abuse. A district court can and should bear in mind that other purposes of the rule include compensating the victims of the Rule 11 violation, as well as punishing present litigation abuse, streamlining court dockets and facilitating court management. White v. General Motors Corp., ___ F.2d ___ , 1990 WL 99472 (10th Cir. 1990); Hartmarx Corp., 110 S. Ct. at 2454-57. But the amount of a monetary sanction should always reflect the primary purpose of deterrence.

When a monetary award is issued, a district court should explain the basis for the sanction so a reviewing court may have a basis to determine whether the chosen sanction is appropriate. A district court should consider the four factors recently enumerated by the Tenth Circuit in White v. General Motors Corp., ___ F.2d ___: (1) the reasonableness of the

opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the Rule 11 violation.

> 1) Reasonableness (lodestar) calculation. Because the sanction is generally to pay the opposing party's "reasonable expenses . . . including a reasonable attorney's fee," Fed.R.Civ.P. 11, incurred because of the improper behavior, determination of this amount is the usual first step. The plain language of the rule requires that the court independently analyze the reasonableness of the requested fees and expenses. The injured party has a duty to mitigate costs by not overstaffing, overresearching or overdiscovering clearly meritless claims. In evaluating the reasonableness of the fee request, the district court should consider that the very frivolousness of the claim is what justifies the sanctions.

___ F.2d at ___ (citations omitted).

Attorney time which is attributed to responding to the media, or to claims within a pleading which do not merit sanctions, should be excluded from consideration. Only attorney time which is in response to that which has been sanctioned should be evaluated. In this

case, it is appropriate for the court to consider on remand whether the large amount of time devoted to the pursuit of sanctions was warranted, and whether the injured parties failed to mitigate their costs by delaying their pursuit of sanctions until after the dismissal. It would also be appropriate for the district court to reduce the amount of any fees awarded based on appellees' failure to give earlier notice to appellants that their conduct warranted Rule 11 sanctions. See Advisory Committee Note. While the analysis of the reasonableness of costs may call for fairly detailed affidavits, this requirement is not intended to require evidentiary hearings.

Although amici curiae for appellants argue that sanctions based in whole or in part on attorney's fees require the same procedures of discovery, briefing, and argument allowed in attorney's fees cases, we have already stated that sanctions, unlike attorney's fees, are not primarily intended to compensate the prevailing party. Because the purposes of sanctions differ from those of attorney's fees, the

amount of process due the offending party differs.

The determination of the type or amount of the sanction imposed comes only after the offending party has had an opportunity to defend against the imposition of any sanction.[4] Presumably, a party's interest in the kind and amount of a sanction is of less import than his or her interest in the decision to impose any sanction. As stated, a district court is required to choose the least severe sanction adequate to accomplish the purpose of Rule 11. Thus, a monetary sanction should never be based solely on the amount of attorney's fees claimed by the injured party, even where a court determines that the amount of the sanction should equal the fees claimed by the injured party. As we have previously

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[4]Appellants have already had this opportunity, and on the present record we are convinced that Rule 11 sanctions against the three appellants are not only proper, but they are required if the Rule is to have any meaning.

stated, "reasonable" attorney's fees in the context of Rule 11 "does not necessarily mean actual expenses and attorney's fees." Fahrenz v. Meadow Farm Partnership, 850 F.2d 207, 211 (4th Cir. 1988). Because the amount of a monetary sanction is not based solely on any claimed amount of attorney's fees, but rather on all of the factors listed herein, the risk of an erroneous calculation based on fee statements is less troublesome in the context of a Rule 11 sanction than in attorney's fees cases. We also bear in mind the interest in avoiding additional hearings for purposes of calculating the amount of fees in the context of Rule 11. See Advisory Committee Note. Given these considerations, we hold that a sanctioned party is not entitled to an evidentiary hearing or to all of the procedural safeguards available in the context of attorney's fees actions. Instead, a district court may permit a sanctioned party to respond to an opposing party's fee statements in its discretion. Of course, such discretion must be exercised with proper considerations of

due process. Where a court determines that a large monetary sanction should issue, and the amount is heavily influenced by an injured party's fee statements, as was the case here, the court should permit the sanctioned party to examine and contest the injured party's fee statements as an aid to the court's own independent analysis of the reasonableness of the claimed fees.

> 2) Minimum to deter. As we have already stated, the primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice. Such decisions are properly made by those charged with handling attorney disbarment and are generally accompanied by specific due process provisions to protect the rights of the attorney in question. . . . [T]he amount of sanctions is appropriate only when it is the 'minimum that will serve to adequately deter the undesirable behavior.' . . . Thus, the limit of any sanction award should be that amount reasonably necessary to deter the wrongdoer.

White, ___ F.2d at ___ (citations

omitted).

A district court must constantly bear in mind the limited purposes of Rule 11, particularly in a case such as this, where a court may disagree with aspects of counsel's conduct which fall outside of the scope of Rule 11. Of course, a court must also constantly bear in mind that the rule is not to chill the bringing of facially valid lawsuits, or a lawyer's creativity in introducing novel theories of recovery.

> 3. Ability to pay. The offender's ability to pay must also be considered, not because it affects the egregiousness of the violation, but because the purpose of monetary sanctions is to deter attorney and litigant misconduct. Because of their deterrent purpose, Rule 11 sanctions are analogous to punitive damages. It is hornbook law that the financial condition of the offender is an appropriate consideration in the determination of punitive damages. . . . Inability to pay what the court would otherwise regard as an appropriate sanction should be treated as reasonably akin to an affirmative defense, with the burden upon the parties being sanctioned to come forward with evidence of their financial status.

White, ___ F.2d at ___ (citations omitted).

Although the burden is upon the parties being sanctioned to come forward with evidence of their financial status, a monetary sanction imposed without any consideration of ability to pay would constitute an abuse of discretion. A court should refrain from imposing a monetary award so great that it will bankrupt the offending parties or force them from the future practice of law. Generally, the smaller the amount of the monetary sanction imposed, the greater the likelihood that a court's consideration of the ability to pay will not want for lack of the formal submission of evidence on a sanctioned party's financial status. When the monetary sanction is large, however, the parties should generally be given the opportunity to submit affidavits on their financial status, or to submit such other evidence as the court's discretion permits. In this case, the amount of the monetary sanction originally imposed was substantial, and the parties should have been afforded the opportunity to submit

evidence on the issue of whether the amount imposed was so great as to unfairly restrict their access to the courts or to otherwise curtail their ability to practice law or to cause them great financial distress.

> 4. Other factors. In addition, the court may consider factors such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances. See [American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure (1988), reprinted in 5 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, 212, 236-37 (Supp. 1989)].

In this case, it is appropriate for the court to consider counsel's vast experience, the outrageous and scandalous nature of the claims made, and the improper purpose of the lawsuit. A court might also increase a sanction if one attorney has been previously sanctioned, because such conduct might indicate that the previous sanction was not enough to

deter the repetition of the offense.

In addition to the four factors just stated, a district court must sometimes consider whether joint and several liability is appropriate, such as where sanctions are to be imposed against both a client and his counsel. In this case, joint and several liability among attorneys, who each signed a complaint in violation of Rule 11, was not inappropriate. Under Pavelic & LeFlore v. Marvel Entertainment Group, each attorney has a duty to ensure that the pleading he has signed comports with Rule 11. Issues of individual culpability do not arise where each sanctioned party has committed the same Rule 11 violations.

B. Additional Sanctions

In addition to imposing sanctions in the amount of attorney's fees claimed by the defendants, the district court imposed sanctions in the amount of $10,000 upon each appellant based on his conduct in wilfully filing outrageous claims and appellants' "pains to publicize the allegations through the media." We believe this sanction was error. Rule 11 does not

confine courts to any maximum monetary sanction, nor does it even require courts to restrict themselves to monetary penalties. However, Rule 11 must be accorded its plain meaning. The text of the Rule clearly pertains only to a "pleading, motion, or other paper." Rule 11 does not encompass all conduct within judicial proceedings, and it clearly does not reach conduct outside of the judicial process. Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987). In this case, it appears the court imposed sanctions in part based on appellants' publication of their baseless claims through the media. While such publication may not be actionable as libel or slander, and is reprehensible, Rule 11 was clearly not designed to encompass such conduct.

VI

Appellants' argument that the district court should have granted their own motion for sanctions against appellees is without merit. The denial was not an abuse of discretion.

VII

CONCLUSION

In sum, we affirm the findings of the district court which led to the imposition of Rule 11 sanctions in this case against plaintiffs' attorneys. However, we vacate the sanction imposed, because it was based on improper considerations and the size of the sanction required the district court to allow sanctioned counsel an opportunity to respond, at least to the fee statements on which the sanction was based. On remand, the district court should consider the factors which we have adopted prior to determining the sanction which should be imposed.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

FAYETTEVILLE DIVISION

NO. 89-06-CIV-3-H

ROBESON DEFENSE COMMITTEE, et al., CARNELL LOCKLEAR, MARY SANDERSON, THELMA CLARK, ELEANOR JACOBS, BETTY McKELLAR, EDDIE HATCHER, and TIMOTHY JACOBS, Plaintiffs, v. JOE FREEMAN BRITT, RICHARD TOWNSEND, LEE EDWARD SAMPSON, HUBERT STONE, LACY H. THORNBURG, ROBERT MORGAN, JAMES BOWMAN, JAMES G. MARTIN, SBI DOE I, SBI DOE II, SBI DOE III, DEPUTY SHERIFF DOE I, DEPUTY SHERIFF DOE II, DEPUTY SHERIFF DOE III, DEPUTY SHERIFF DOE IV, DEPUTY SHERIFF DOE V, DISTRICT ATTORNEY DOE I, DISTRICT) ATTORNEY DOE II, DISTRICT ATTORNEY DOE III, ROBESON COUNTY, et al., Defendants.	[Stamped:] FILED SEP 29 1989 J. RICH LEONARD, CLERK O R D E R

This matter is before the court on the parties' cross-motions for sanctions pursuant to Fed. R. Civ. P. 11. Plaintiffs filed this civil rights action under 42 U.S.C. § 1983, alleging a deprivation of constitutional rights. Plaintiffs include the Robeson Defense Committee, an unincorporated association, several Native-American and African-American residents of Robeson County, Eddie Hatcher, and Timothy Jacobs. Defendants include Governor Jim Martin, former District Attorney Joe Freeman Britt, District Attorney Richard Townsend, Attorney General Lacy Thornburg, Director of the State Bureau of Investigation Robert Morgan, state employee Lee Edward Sampson, and various John Doe State Bureau of Investigation agents and assistant district attorneys.

STATEMENT OF FACTS

This civil rights action arose out of the criminal proceedings that followed the armed takeover of the Robesonian newspaper by plaintiffs Hatcher and Jacobs. Hatcher and Jacobs were acquitted by a federal

jury on federal charges stemming from the takeover. Their defense was that the takeover was necessary to gain protection and to have a forum to express their views that the local sheriff and district attorney offices were corrupt.

Hatcher and Jacobs were subsequently indicted by the State on State charges arising out of the Robesonian takeover. This State prosecution and the circumstances surrounding it allegedly formed the basis for plaintiffs' § 1983 complaint. Plaintiffs asked for damages and an injunction of the State criminal proceedings.

Plaintiffs filed the complaint on January 31, 1989 over the signature of Barry Nakell and filed an amended complaint on March 16, 1989 over the signature of Nakell, William Kunstler, and Lewis Pitts. Plaintiffs alleged, among other things, that Governor Martin, through his agents, negotiated an agreement with Hatcher and Jacobs that they would not be prosecuted by Robeson County law enforcement authorities. Plaintiffs allege that Governor Martin

agreed with defendants Britt, Thornburg and the U. S. Attorney's Office that Hatcher and Jacobs would be prosecuted by federal, not state, authorities. It is alleged that the State prosecution violates this agreement.

The complaint alleges that following the federal acquittal, the plaintiffs engaged in First Amendment activity in Robeson County in an effort to encourage political change. Plaintiffs allege that various defendants conspired to harass and intimidate plaintiffs to prevent them from engaging in these First Amendment activities.

Plaintiffs allege that various defendants interfered with Jacobs' Sixth Amendment rights by advising his family and friends that Jacobs should fire his New York counsel and retain local counsel and that Jacobs should voluntarily return to North Carolina to testify against Hatcher. Plaintiffs allege that these communications interfered with Jacobs' relationship with his counsel and his joint defense with Hatcher. Plaintiffs also allege that defendants attempted to

coerce Jacobs into testifying in violation of Hatcher's Fifth Amendment rights. Plaintiffs assert finally that the subsequent State prosecution violated the Double Jeopardy Clause.

After defendants answered and filed a motion to dismiss, plaintiffs requested a voluntary dismissal with prejudice under Fed. R. Civ. P. 41(a)(2), which this court granted on May 2, 1989. Defendants subsequently moved for Rule 11 sanctions based on the complaint and amended complaint; plaintiffs moved for Rule 11 sanctions based on defendants' Rule 11 motion. Plaintiffs also asked for discovery and an evidentiary hearing. The court, having been inundated with written materials[1] and having heard oral arguments, is now prepared to rule on these motions and requests.

RULE 11

[1] On the Rule 11 motion alone, the defendants have written 97 pages of memoranda, the plaintiffs 90. Each side has submitted several hundred pages of appendices. The previous filings in the case are of similar length.

Rule 11 of the Federal Rules of Civil Procedure states in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is signed in violation of this rule, the court, ... shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11 has three prongs, the violation of any one of which justifies sanctions. First, any pleading signed by an attorney must not be interposed for any improper purpose. See NCNB Nat. Bank of North Carolina v. Tiller, 814 F.2d 931 (4th Cir. 1987). Second, a pleading must be warranted

by existing law or a good faith argument for modification of existing law. See Cabell v. Petty, 810 F.2d 463 (4th Cir. 1987). Third, Rule 11 requires an attorney to make reasonable inquiry to determine that the pleading is well grounded in fact. See Fahrenz v. Meadow Farm Partnership, 850 F.2d 207 (4th Cir. 1988). The court discusses in greater detail the development and purposes of Rule 11 in Barnett D. Plotkin, et al. v. Association of Eye Care Centers, Inc., et al., No. 88-87-CIV-5-H (E.D.N.C. September ___, 1989), in which this court today has denied a request for sanctions. Therefore, the court will not again address the development and purpose of Rule 11 in this order.

As a preliminary matter, plaintiffs argue that the dismissal of this action pursuant to Rule 41(a)(2) precludes the defendants from bringing the present Rule 11 motion. Plaintiffs argue that defendants did not reserve the right to file such a motion and that the court's dismissal contained no such reservation. This argument is without merit.

Nothing in the Rule states that a party

loses the right to Rule 11 sanctions if he fails to reserve such a right as a condition to a Rule 41(a)(2) dismissal. The terms and conditions that may be imposed upon a voluntary dismissal are for the protection of the defendant. Wright & Miller, Federal Practice and Procedure:Civil § 2366 (1971 and Supp. 1988). A voluntary dismissal without prejudice allows a plaintiff to bring a later identical action. Therefore, it is the defendant's interests which are protected by conditions imposed in a Rule 41(a)(2) dismissal. LeCompte v. Mr. Chip. Inc., 528 F.2d 601, 603 (5th Cir. 1976).

In this case, the court dismissed the plaintiffs' suit with prejudice. Such a dismissal constitutes a final judgment and bars the plaintiffs from bringing a second suit on the same cause of action. The need to protect the defendants' interest due to the possibility of a second suit is not present in this case. Nothing in Rule 41(a)(2) bars this Rule 11 motion. Harris v. Marsh, 123 F.R.D. 204, 228-29 (E.D.N.C. 1988), citing Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1076-79 (7th Cir. 1987), cert. dismissed, ___ U.S. ___,

108 S.Ct. 1011, 99 L.Ed.2d 229 (1988).[2]

PLAINTIFFS BROUGHT THIS CIVIL ACTION FOR AN IMPROPER PURPOSE

The court addresses this prong first because it is greatly concerned with the motives of plaintiffs' attorneys and the manner in which they have conducted themselves. The activities of plaintiffs and their counsel, as well as the papers filed with the court, indicate that plaintiffs' attorneys initiated the § 1983 action not to vindicate constitutional rights, but more probably to gain publicity and to influence the State prosecution then underway against Hatcher and Jacobs.[3]

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[2]Plaintiffs next argue that the defendants' Rule 11 motion is not timely in that it was filed two months after the dismissal. This argument is without merit. Hicks v. Southern Maryland Health Systems Agency, 805 F.2d 1165 (4th Cir. 1987) (in absence of local rule, the only time limitation arises out of equitable considerations that a district judge may weigh in his discretion).

[3]Plaintiffs' counsel asserts that asking for an injunction is a proper way to "interfere" with a pending state prosecution. The court agrees; however,

This action was filed on January 31, 1989, which is significant in that it was the day before the one-year anniversary of the Robesonian takeover. Moreover, counsel did not merely file the complaint, but followed it with a press conference on the Robeson County Courthouse steps. The voluntary dismissal was conducted with considerably less fanfare.[4]

Plaintiffs assert that they filed the civil rights action in response to harassment and intimidation directed towards them from October 14, 1988 to January 31,

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the court finds improper purpose from conduct other than the mere filing of a request for injunctive relief.

[4]The court is aware that conducting a press conference is a First Amendment activity. The court is not imposing sanctions because of this press conference. The court does not mean to indicate that it will impose Rule 11 sanctions on attorneys who speak to the press. However, the court believes that the press conference and what was said therein, considered in light of the surrounding circumstances, is evidence of improper purpose.

1989. The complaint sought injunctive relief ordering termination of the harassment, termination of the prosecution, and termination of the State's communication with Jacobs and his family concerning his legal representation. However, plaintiffs waited through October, November, December, and January to file this complaint. This timing indicates that the motivation behind the complaint was not the vindication of constitutional rights. Mr. Pitts stated to the press after the dismissal:

> The relief we could have won would be, I think, very limited compared to the amount of resources that would have had to be plowed into it .... And we think there would be better ways of raising the issues of injustice and drug trafficking and deliberate indifference by public officials than by the suit.

Defendants' Memorandum, Exhibit 3 (undated Raleigh News and Observer article).

The question arises as to why plaintiffs' filed this suit. First, plaintiffs faced Jacobs' extradition hearings in New York the following month. The court finds that the civil action was instituted as leverage in these extradition proceedings. Neal P. Rose, a New York

District Attorney, has filed an affidavit with the court stating that Mr. Pitts offered to dismiss this civil action as part of the plea bargain and that Mr. Pitts admitted that the civil suit had been commenced as leverage and that it had no basis in fact. Defendants' Memorandum, Exhibit 2. In response, Mr. Pitts contends that he was concerned only with the negative consequences of the civil rights action as it related to the pending criminal prosecutions. Plaintiffs' Memorandum at 40. This contention is difficult to accept in light of the intentional publicity that plaintiffs gave this case. It would appear that had Mr. Pitts truly been concerned with the negative consequences of the § 1983 case, he would not have intentionally tweaked the state's nose in a press conference.

Second, the day the complaint was filed, Mr. Nakell wrote a letter to State Court Judge Anthony M. Brannon, who likely would have been the judge to try Hatcher and Jacobs, and enclosed a copy of the federal civil complaint. Defendants' Memorandum in Support of Motion for a Protective Order,

Exhibit D. This somewhat astonishing conduct indicates that the motive behind the filing of the civil rights action was to influence Judge Brannon and other state and county officials.

Third, plaintiffs filed this action to obtain discovery otherwise unobtainable under North Carolina Criminal Procedure. By naming Bowman and Britt as defendants, plaintiffs could obtain discovery of the State's criminal investigatory files otherwise unavailable to them under North Carolina procedure. Shortly after filing the complaint, plaintiffs sought leave of court to depose Bowman, even though they had not yet served all of the defendants. Plaintiffs sought expedited discovery, not because it was necessary to pursue the civil action, but because normal discovery would not have helped them in Jacobs' upcoming extradition hearing in New York. Furthermore, at the press conference announcing the filing of the suit, Mr. Pitts stated that "now we have the subpoena power ...," indicating that the action was filed to gain access to State Bureau of Investigation files, rather than to vindicate constitutional rights. After

the extradition hearing, the suit was dropped.[5]

The most damning evidence of all, however, is the sudden and inexplicable voluntary dismissal with prejudice on May 2, 1989. Significantly, this dismissal occurred after Jacobs lost his extradition fight and returned to North Carolina and before any significant discovery or other event which would have given notice to the plaintiffs that their claims were not valid. Indeed, with Jacobs now back in North Carolina, he would have once again been subject to the unconstitutional conduct of the various defendants.

Plaintiffs state as a reason for the dismissal that the Sixth Amendment issues had become moot since Jacobs had received an acceptable plea bargain, and that the

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[5]Furthermore, in plaintiffs' cross-motion for sanctions they again ask for discovery. They have failed to show why discovery would be necessary to litigate these Rule 11 motions. Discovery would, however, be helpful to the criminal defense of Mr. Hatcher who now faces 14 charges of second degree kidnapping.

First Amendment objections were no longer important because the interference had stopped. Neither reason is credible if the true intent of plaintiffs was to vindicate constitutional rights. Plaintiffs alleged widespread First Amendment violations impacting on a number of persons. The mere fact that the conduct stopped does not moot those claims. Nor is it clear that Jacobs' Sixth Amendment claims are moot just because he retained other counsel. United States v. Smith, 653 F.2d 126 (4th Cir. 1981); Powell v. Alabama, 287 U. S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932) (constitutional right to counsel includes right to counsel of one's choice). Jacobs still had a claim that the defendants intentionally interfered with his counsel of choice, and Hatcher and Jacobs still had a claim that their joint defense had been impaired.

Plaintiffs have alleged a widespread conspiracy involving high-level state and county officials. It is absurd to think that these allegations were suddenly unimportant by May 2, 1989. Furthermore, the basis of the complaint is that the State promised Hatcher and Jacobs that it would not

prosecute them. If this were true, the alleged breach of this agreement still exists as to Hatcher and even as to Jacobs following his guilty plea.

Plaintiffs alleged that the prosecution of Hatcher and Jacobs was barred by the Double Jeopardy Clause. Those claims, if they were valid to begin with, were every bit as valid when plaintiffs dismissed the case. None of the damage claims and few of the requests for equitable relief were affected by any event occurring between the date of filing and the date of dismissal. Hatcher and Jacobs remained subject to the same purportedly unconstitutional prosecutions, and counsel's assertion that the alleged oppression of civil liberties in Robeson County had suddenly ceased is not credible.

Defendants contend that a financial decision was made that the damage claims did not warrant the extensive expenditure of time and professional resources. Such a decision should have been made before suit was filed. After the dismissal, Mr. Pitts was quoted as saying that the case was dismissed after the Attorney General's

Office "made it very clear that ... everything was going to be arm's length warfare." Defendants' Memorandum, Exhibit 3 (undated Raleigh News and Observer article). The court concludes that plaintiffs brought the suit for publicity purposes and dropped it when major opposition resulted. This in itself violates Rule 11.

Counsel contended at the hearing that the suit was dismissed because the State had successfully split Hatcher and Jacobs. However, this fact makes none of their claims less cognizable, and, more importantly, there is evidence that Hatcher and Jacobs had parted ways before even the original complaint was filed. Plaintiffs' Memorandum, Exhibit 56.

This court is forced to conclude that plaintiffs' counsel never intended to litigate this § 1983 action and that counsel filed it for publicity, to embarrass state and county officials, to use as leverage in criminal proceedings, to obtain discovery for use in criminal proceedings, and to intimidate those involved in the prosecution of Hatcher and Jacobs. All of these purposes are improper and warrant sanctions under

Rule 11. Even if the complaint had a proper legal and factual basis, sanctions would be appropriate since this court finds that the purpose of the lawsuit was improper. See e.g., Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987).

COUNSEL FAILED TO MAKE A REASONABLE INQUIRY TO DETERMINE IF THE COMPLAINT WAS WELL GROUNDED IN FACT AND WARRANTED BY EXISTING LAW

Plaintiffs filed a 35 page complaint and a 30 page amended complaint, much of which consisted of editorialization and a history lesson which even included a discussion of the use of segregated restrooms and water fountains in Robeson County since the time of Reconstruction. A complaint in federal court is supposed to be a "short and plain statement showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint is neither short nor plain and much of it, if not all of it, fails to show that any plaintiff is entitled to any relief. The complaint is riddled with claims that justify Rule 11 sanctions.

First, plaintiffs argue that the subsequent prosecution violates the Double Jeopardy Clause. First year law students learn that the Double Jeopardy Clause does not prohibit subsequent prosecutions by different sovereigns. This concept was reaffirmed by the United States Supreme Court just four years ago in Heath v. Alabama, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985). Heath is the latest in an unbroken chain of decisions ranging back at least as far as United States v. Lanza, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed 314 (1922). If plaintiffs' contention qualifies as a good faith argument for reversal of existing law, then precedent means nothing, and we will have to relitigate forever settled concepts of law. Plaintiffs also contend that the "tool of the same authorities" exception justifies their double jeopardy claim. Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959). This exception, however, does not bar cooperation between sovereigns; plaintiffs must establish that State officials had little or no independent volition in the State proceedings. United

States v. Liddy, 542 F.2d 76, 79 (D.C. Cir. 1976). Plaintiffs allege, however, that the State officials instituted and controlled the subsequent proceedings; therefore, plaintiffs knew they had no basis for making a double jeopardy allegation.[6] Mr. Pitts even admitted to the press after filing the complaint that no double jeopardy problem existed. Pattishal, Justice in Robeson County: Carrboro Lawyers, Southern Racism, Bizarre Politics, and Death in the Cocaine Wilds, Robeson County Leader, April 13, 1989.

Second, plaintiffs contend that Hatcher's Fifth Amendment rights were harmed when the state tried to extract incriminating testimony from Jacobs. Amended Complaint, Par. 51. Fifth Amendment protection is personal to the individual whose testimony is being compelled. Moran v. Burbine, 475 U.S. 412, 433, 106 S.Ct. 1135, 1147, 89 L.Ed.2d 410, 428 (1986). Any

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[6]Plaintiffs even alleged that the prosecution violated the state Double Jeopardy Clause, which cannot be asserted in a § 1983 action.

testimony from Jacobs concerning Hatcher does not implicate Hatcher's right against self-incrimination. This claim has no basis in the law.

Third, plaintiffs requested an injunction of the State criminal proceedings, which is clearly barred by federal abstention doctrine. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Hatcher and Jacobs had ample opportunity to present their federal constitutional claims regarding the validity of the prosecution to the state courts. Judice v. Vail, 430 U.S. 327, 337, 97 S.Ct. 1211, 51 L.Ed.2d 376, 385 (1977). Plaintiffs had no basis for asserting that the state prosecution was brought in bad faith. In the context of Younger abstention, bad faith generally means without a reasonable expectation of conviction. Suggs v. Brannon, 804 F.2d 274, 278 (4th Cir. 1986). Hatcher and Jacobs have never denied taking hostages, so there is simply no basis for believing that the State did not have a reasonable expectation of conviction. Plaintiffs have presented this court with no cases applying a Younger exception which

even remotely resembles this case; their allegations of bad faith in affidavits submitted to the court are nothing but speculation. Furthermore, plaintiffs have failed to present one fact indicating that the prosecution was initiated to harass the plaintiffs.

Fourth, there are serious standing problems with many of the plaintiffs' claims. The complaint alleges that the prosecution of Hatcher and Jacobs has chilled their First Amendment expression. However, the Supreme Court has held that allegations of mere chill without any objective harm is not grounds for equitable relief. Laird v. Tatum, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26, 33 L.Ed.2d 154 (1972). Plaintiffs have not presented any facts showing a specific, present objective harm or a threat of specific future harm.

Fifth, plaintiffs misstate numerous facts in an effort to implicate the defendants in a massive and sinister conspiracy. Plaintiffs assert that the district attorney "serves as the criminal prosecution arm of defendant Robeson County and as such makes policy in police

investigation and criminal prosecution matters for Robeson County ...." Amended Complaint, Par. 9-10. A simple reading of N.C.G.S. 7A-61, et seq. indicates that the district attorney is an officer of the State and neither an agent nor an employee of Robeson County. Plaintiffs further allege that defendants Britt, Townsend and Sampson serve as agents or employees of Robeson County. These individuals are State officers and do not work for Robeson County. Plaintiffs also allege that District Attorney Britt refused and failed to discipline, train and supervise Sheriff's deputies. Amended Complaint, Par. 18. North Carolina District Attorneys possess no such power or responsibility.

Plaintiffs' counsel have previously misstated the duties and responsibilities of public officials named in a suit to implicate them in a conspiracy. Mr. Pitts, in Waller v. Butkovich, 584 F. Supp. 909, 935 n.5 (M.D.N.C. 1984), was cited for making misrepresentations concerning state law enforcement personnel. It would appear that a similar tactic has been employed in this present matter.

Sixth, one of the major allegations in the complaint is that the Governor, the Attorney General, and the District Attorney entered into an agreement that Hatcher and Jacobs would be prosecuted in federal and not state court. However, an examination of the North Carolina General Statutes reveals that neither the Governor nor the Attorney General possesses the power to bind the State not to prosecute.

As early as February 26, 1988, plaintiffs' counsel had access to the transcript of the negotiations leading to the hostage release agreement as well as a copy of the written agreement. Nothing in the agreement between Hatcher and Kirk, or in any of the negotiations, suggests an agreement that Hatcher and Jacobs would not face North Carolina charges, and none of the negotiators had the authority to so agree.

Seventh, plaintiffs have acknowledged to the court that when they filed the complaint asking for a temporary restraining order, they did not possess facts sufficient to establish the necessity of such an order. In Plaintiffs' Memorandum and Opposition to Defendants' Motion for a Protective Order,

plaintiffs wrote:

> Plaintiffs anticipate that as a result of [deposing defendant Bowman] they will be in a position to apply to this court for temporary injunctive relief and make the showing required by Rule 65(b) of the Federal Rules of Civil Procedure. Plaintiffs should be permitted to pursue that standard course of action.

It is not a standard course of action to file a complaint and then conduct discovery in the "anticipation" that the complaint will prove warranted. In fact, such a course of conduct merits Rule 11 sanctions.

Finally, the complaint is filled with serious allegations of malfeasance of duty and criminal conduct on the part of high ranking state and local officials. Many of these allegations have nothing to do with this case or these plaintiffs and many are factually unsubstantiated.

For example, plaintiffs allege that a black inmate recently died while in Sheriff Stone's custody. Amended Complaint, Par. 27. The inmate's estate and family are not parties to this action and none of the plaintiffs were damaged by the inmate's death. Plaintiffs also allege that Sheriff

Stone is engaged in illegal drug trafficking, but allege no injury special to them and have failed to produce one hard fact to justify this allegation.

Plaintiffs allege that blacks and Indians in Robeson County have been subject to abusive behavior, but none of these plaintiffs allege that they have been assaulted or injured. Amended Complaint, Par. 25. Plaintiffs allege that Robeson County is beleaguered by poverty, illiteracy, and violence, none of which has anything to do with these plaintiffs stating a claim against these defendants. Amended Complaint, Par. 26.

Plaintiffs allege that Britt, Townsend, Thornburg and Morgan conspired to orchestrate the appointment of Townsend as District Attorney and to use State Bureau of Investigation agents as political police to discredit the only Republican candidate. Amended Complaint, Par. 44. First, counsel has failed to demonstrate that they had any factual basis for this allegation. Second, it has nothing to do with this case; the Republican candidate is not a party and none of the plaintiffs allege any injury from

this incident.

All of this gratuitous commentary on the life and times in Robeson County, even if true, does not support any of the claims for relief; this court can conclude only that counsel included them for publicity and to intimidate the defendants and others involved in the Hatcher and Jacobs prosecution.

Counsel has submitted a stack of affidavits and exhibits purporting to explain why they believed they had a factual basis for filing the suit. The court has reviewed this material and is not impressed. Most of the affidavits, particularly those of counsel, are self-serving and largely based on hearsay and speculation. Counsel may subjectively believe these allegations to be true (and some of them may even be true), but Rule 11 applies an objective test. Counsel simply did not have a factual basis which would lead a reasonable attorney to believe that this civil action was justified.

In summary, the court finds that the entire complaint is tainted by improper purpose, and that counsel failed to conduct

a reasonable inquiry into the factual and legal allegations they were making.[7] Sanctions are imposed not merely because the legal and factual assertions in the complaint were erroneous; they are imposed because counsel would have discovered they were erroneous upon minimal research and investigation. A reasonable attorney would not have believed that this complaint was well grounded in fact or warranted by existing law.

PLAINTIFFS' CROSS-MOTION FOR RULE 11 SANCTIONS

As noted above, plaintiffs' counsel has filed a Rule 11 motion in response to defendants' Rule 11 motion, in which plaintiffs' counsel ask for discovery and

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[7]Mr. Kunstler states in an affidavit to the court that he had no personal knowledge of facts justifying the complaint and that he relied exclusively on Mr. Nakell. Plaintiff's Memorandum, Exhibit 3. In light of the serious allegations in the complaint, Mr. Kunstler's total reliance on other counsel is itself a violation of Rule 11. Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir. 1987).

an evidentiary hearing. Discovery is not permitted on Rule 11 motions absent extraordinary circumstances. See Adv. Com. Note to Fed. R. Civ. P. 11. No extraordinary circumstances exist in this case justifying discovery or an evidentiary hearing. For the reasons stated previously in this order, defendants' Rule 11 motion was properly filed, and the Rule 11 motion of plaintiffs' counsel must be and is hereby denied.

SANCTIONS ON PLAINTIFFS' COUNSEL

Needless to say, the imposition of sanctions under Rule 11 is not done lightly, or without great reflection on the part of the court. With this in mind, the court notes that throughout the history of this country, there have been numerous attorneys specializing in the area of civil rights. These attorneys have played an invaluable role in instigating and promoting numerous societal goals, many of which we now take for granted. Certainly the respondent Mr. Kunstler has been a leading civil rights attorney for many years. Nonetheless, Rule 11 applies to all attorneys, civil rights lawyers not excepted. Oliver v. Thompson, 803 F.2d 1265, 1280-81 (2d Cir. 1986), cert.

denied, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987). The court is certain that today's ruling in no way will deter civil rights lawyers from filing legitimate complaints in the future to protect the civil rights of others and the Constitution that we all hold so dear.

This court has ruled on one issue and one issue only: the pending Rule 11 motions. The parties have attempted to lead this court into a broader inquiry into alleged corruption in Robeson County in general, and in Robeson County and North Carolina law enforcement in particular. Whether these allegations are true or false is not the issue currently before the court. The sole issue is whether the plaintiffs' counsel conducted a reasonable inquiry to determine if the complaint filed on January 31, 1989 and the subsequent amended complaint were well grounded in fact and law and were not filed for an improper purpose. Even if it were later determined that the allegations raised in those complaints were true, this court finds that the conduct of plaintiffs' counsel at the time of the filing of the original and the amended complaint is

nonetheless sanctionable.

Having ruled that plaintiffs' counsel have violated Rule 11, sanctions are mandatory. Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987). The first purpose of sanctions under Rule 11 is to compensate the offended parties for all reasonable expenses incurred by reason of the Rule 11 violation. Accordingly this court hereby imposes liability on William M. Kunstler, Barry Nakell, and Lewis Pitts, jointly and severely, in the amount of NINETY-TWO THOUSAND EIGHT HUNDRED THIRTY-FOUR DOLLARS AND TWENTY-EIGHT CENTS ($92,834.28), representing legal fees and expenses incurred by the State defendants represented by the Office of the Attorney General of North Carolina in the amount of EIGHTY-THREE THOUSAND SIX HUNDRED THIRTEEN DOLLARS AND FIFTY-EIGHT CENTS ($83,613.58) and Robeson County defendants represented by Steven C. Lawrence of the law firm of Anderson, Broadfoot, Johnson & Pittman in the total amount of NINE THOUSAND TWO HUNDRED TWENTY DOLLARS AND SEVENTY CENTS ($9,220.70). This court has reviewed the affidavits filed by the attorneys of the North Carolina Attorney

General's Office and finds the computation and final statement of costs and expenses incurred by the State in the defense of this matter to be reasonable and accurate, and also finds the affidavit of Steven Lawrence, Esquire, on behalf of the County defendants to be reasonable and accurate. Accordingly, this court has based its compensatory sanctions on these certified costs and expenses. The court further orders that these amounts be remitted to the Clerk of the United States District Court for the Eastern District of North Carolina with interest at the rate of 8.19% per annum from the date of the filing of this order. When these sums are received by the Clerk of this court, he shall in turn remit to the State of North Carolina the amount of EIGHTY-THREE THOUSAND SIX HUNDRED THIRTEEN DOLLARS AND FIFTY-EIGHT CENTS ($83,613.58) plus accrued interest and shall remit to Robeson County the amount of NINE THOUSAND TWO HUNDRED TWENTY DOLLARS AND SEVENTY CENTS ($9,220.70) plus accrued interest.

Compensation to the offended parties is not the only purpose for sanctions under Rule 11, however. In addition, the court may

award sanctions to serve as a deterrence to others and as punishment to the particular attorneys involved. The court hereby imposes these punitive sanctions because of the egregious nature of the violations of Rule 11 in the present case. This is not a typical Rule 11 case in which an attorney may have been a little careless or sloppy in filing an improper complaint. Plaintiffs' counsel alleged that high-ranking public officials of both Robeson County and the State of North Carolina willfully (Amended Complaint, Par. 58) violated the constitutional rights of a number of individuals, and then plaintiffs' counsel took pains to publicize these allegations through the media. Accordingly, this court imposes additional sanctions on William M. Kunstler, Barry Nakell, and Lewis Pitts each in the amount of TEN THOUSAND DOLLARS ($10,000) which shall not bear interest. These sanctions of TEN THOUSAND DOLLARS ($10,000) each shall be remitted to the Clerk of the United States District Court for the Eastern District of North Carolina for credit and transmission to the Treasury of the United States.

This court further orders that until the aforementioned amounts are paid, with interest on those sums ordered to be paid with interest, William M. Kunstler, Barry Nakell and Lewis Pitts are hereby prohibited from appearing in or practicing before the United States District Court for the Eastern District of North Carolina.

Accordingly, it is hereby ORDERED that the motion of the defendants (State and County) for sanctions against William M. Kunstler, Barry Nakell, and Lewis Pitts is GRANTED in the amounts and forms specified above. It is further ORDERED that the plaintiffs' cross-motion for sanctions is DENIED.

This 28th day of September, 1989.

s/Malcolm J. Howard
United States District Judge

At Greenville, NC
#22

CERTIFIED
BY: s/_____
Deputy Clerk
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 11, 1990

No. 89-2815

In Re: WILLIAM M. KUNSTLER; BARRY NAKELL; LEWIS PITTS

Appellants

ROBESON DEFENSE COMMITTEE; CARNELL LOCKLEAR; MARY SANDERSON; THELMA CLARK; ELEANOR JACOBS; BETTY MCKELLAR; EDDIE HATCHER; TIMOTHY BRYAN JACOBS

Plaintiffs

v.

JOE FREEMAN BRITT; RICHARD TOWNSEND; LEE SAMPSON; HUBERT STONE; LACY THORNBURG; ROBERT MORGAN; JAMES BOWMAN; SBI DOE, I; SBI DOE, II; SBI DOE, III; DEPUTY SHERIFF DOE, I; DEPUTY SHERIFF DOE, II; DEPUTY SHERIFF DOE, III; DEPUTY SHERIFF DOE, IV; DEPUTY SHERIFF DOE, V; DA DOE, I; DA DOE, II; DA DOE, III; ROBESON COUNTY

Defendants - Appellees

THE NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS; NORTH CAROLINA CIVIL LIBERTIES UNION; NORTH CAROLINA ACADEMY OF TRIAL LAWYERS; NATIONAL LAWYERS' GUILD, North Carolina Chapter; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST; NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE;

SOUTHERN ORGANIZING COMMITTEE FOR SOCIAL AND ECONOMIC JUSTICE AND OTHER SOCIAL ORGANIZATIONS

Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellants' petitions for rehearing and suggestions for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestions for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that all of the petitions for rehearing and suggestions for rehearing in banc are denied. Appellant Barry Nakell's motion to withdraw this Court's opinion is denied, and both motions for leave to file amicus briefs in support of the petitions for rehearing are granted.

Entered at the direction of Judge Chapman with the concurrence of Judge Wilkinson and Judge Wilkins.

For the Court,

[Stamped:] JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

89-06-CIV-3-8

ROBESON DEFENSE COMMITTEE, CARNELL LOCKLEAR, MARY SANDERSON, THELMA CLARK, ELEANOR JACOBS, BETTY McKELLAR, EDDIE HATCHER, TIMOTHY JACOBS,	)	[Stamped:] FILED MAR 16 1989 J. RICH LEONARD CLERK
Plaintiffs,	)	
v.	)	
JOE FREEMAN BRITT, RICHARD TOWNSEND, LEE EDWARD SAMPSON, HUBERT STONE, LACY THORNBURG, ROBERT MORGAN, JAMES BOWMAN, JAMES G. MARTIN, SBI DOE I, SBI DOE II, SBI DOE III, DEPUTY SHERIFF DOE I, DEPUTY SHERIFF DOE II, DEPUTY SHERIFF DOE III, DEPUTY SHERIFF DOE IV, DEPUTY SHERIFF DOE V, DA DOE I, DA DOE II, DA DOE III, THE COUNTY OF ROBESON,	)	
DEFENDANTS.	)	

FIRST AMENDED
COMPLAINT FOR
INJUNCTIVE RELIEF
AND DAMAGES FOR
VIOLATION OF CIVIL RIGHTS (42
U.S.C. SECTION 1983)
AND FOR DECLARATORY JUDGMENT
(28 U.S.C. SECTION 2201)

Plaintiffs, by their attorneys, complain and allege as follows:

1. Plaintiff Carnell Locklear is and at all times relevant hereto was a citizen of the United States of America and a Native American resident of Robeson County, North Carolina (Robeson County).

2. Plaintiff Mary Sanderson is and at all times relevant hereto was a citizen of the United States of America and a Native American resident of Robeson County.

3. Plaintiff Thelma Clark is and at all time relevant hereto was a citizen of the United States of America and a Native American resident of Robeson County.

4. Plaintiff Eleanor Jacobs is and at all times relevant hereto was a citizen of the United States of America and a Native American resident of Robeson County.

5. Plaintiff Betty McKellar is and at all times relevant hereto was a citizen of the United States of America and a Black resident of Robeson County.

6. Plaintiff Eddie Hatcher is and at all times relevant hereto was a citizen of the United States of America and a Native American resident of Robeson County. He is a member of the Tuscarora Tribe and is currently in California in the custody of the federal government. Plaintiff Eddie Hatcher is the son of Plaintiff Thelma Clark.

7. Plaintiff Timothy Jacobs is and at all times relevant hereto was a citizen of the United States of America and a Native American resident of Robeson County. He is a member of the Tuscarora Tribe and is currently residing in New York State pending extradition proceedings requested by the State of North Carolina. Plaintiff Timothy Jacobs is the son of Plaintiff Eleanor Jacobs.

8. Plaintiff Robeson Defense Committee is an organization of Indian and Black citizens of Robeson County concerned about the conditions of discrimination,

oppression, and corruption in that county and employing lawful activities protected by the First Amendment to improve the conditions of life in Robeson County for its Black and Indian citizens. Plaintiff Carnell Locklear is the Chairman of the Board of Plaintiff Robeson Defense Committee. Plaintiff Eleanor Jacobs is a member of the Board of Plaintiff Robeson Defense Committee. Plaintiff Mary Sanderson is a member of the Board and the Coordinator of Plaintiff Robeson Defense Committee. Plaintiff Thelma Clark is a member of the Board and the Administrator of Plaintiff Robeson Defense Committee. Plaintiff Robeson Defense Committee has its principal office in Robeson County.

9. Defendant Joe Freeman Britt is a citizen and resident of Robeson County and was the elected District Attorney of North Carolina Judicial District 16, which included Robeson County, at all times relevant hereto until January 1, 1989, when he became the Senior Resident Superior Court Judge of the new North Carolina Judicial District 16B that is composed of Robeson County. As District

Attorney, he had the duty to advise the officers of justice in his district and to prosecute in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of his district. N.C. Const. Art. IV, §18; N.C. G.S. §7A-61. In that capacity, he served as the criminal prosecution arm of Defendant Robeson County and as such made policy in police investigation and criminal prosecution matters for Defendant Robeson County and had general supervisory powers and responsibilities over Defendants Lee Edward Sampson and DA Does I-III and all others in his Office. He is sued in his individual capacity.

10. Defendant Richard Townsend is a citizen and resident of Robeson County and was an Assistant District Attorney of North Carolina Judicial District 16, which included Robeson County, at all times relevant hereto until January 1, 1989, when he became the District Attorney of the new North Carolina Judicial District 16B that is composed of Robeson County, by appointment of the Governor of North

Carolina. In his capacity as District Attorney, he serves as the criminal prosecution arm of Defendant Robeson County and as such makes policy in police investigation and criminal prosecution matters for Defendant Robeson County and has general supervisory powers and responsibilities over DA Does I-III and all others in his Office. He is sued in both his individual and official capacities.

11. Defendant Lee Edward Sampson, a former agent of the State Bureau of Investigation, is a citizen and resident of Robeson County, North Carolina, and is and was at all times mentioned herein employed by the District Attorney of Judicial District 16 or 16B. He is sued in both his individual and official capacities.

12. Defendant Hubert Stone is a citizen and resident of Robeson County, and is and was at all times relevant hereto the elected Sheriff of Robeson County. In that capacity, pursuant to Article 7, §2 of the North Carolina Constitution and Chapter 162 of the North

Carolina General Statutes, he is and was the law enforcement arm of Defendant Robeson County and as such made policy in police matters for Defendant Robeson County and had general supervisory powers and responsibilities over Deputy Sheriff Does I-V and all others in his Department. In addition, pursuant to N.C. G.S. §162-22, he had and has the care and custody of the jail in Robeson County. He is sued in both his individual and official capacities.

13. Defendant Lacy Thornburg is and was at all times relevant hereto the elected Attorney General of North Carolina. In that capacity, Defendant Lacy Thornburg supervises and directs the North Carolina Department of Justice. N.C. G.S. §114-13. He is sued in both his individual and official capacities.

14. Defendant Robert Morgan is and at all times relevant hereto was the Director of the North Carolina State Bureau of Investigation (SBI). The SBI is a division of the North Carolina Department of Justice. N.C. G.S. §114-12. Defendant Robert Morgan was appointed to his

position by Defendant Lacy Thornburg as Attorney General and serves in his position at the will of Attorney General Lacy Thornburg as Attorney General. N.C. G.S. §114-13. He is sued in both his individual and official capacities.

15. Defendant James Bowman is and at all times relevant hereto was an agent of the SBI. He is sued in both his individual and official capacities.

16. Defendants District Attorney Does I-III are and at all times relevant hereto were members of the staff of the Robeson County District Attorney. They are sued in both their individual and official capacities.

17. Defendants SBI Does I-III are and at all times relevant hereto were agents of the SBI. They are sued in both their individual and official capacities.

18. Defendants Deputy Sheriff Does I-V are and at all times relevant hereto were Robeson County Deputy Sheriffs. They are sued in both their individual and official capacities.

19. Defendant James G. Martin is and was at all times relevant hereto the

Governor of North Carolina. In that capacity, he has the state constitutional duty to take care that the laws be faithfully executed, N.C. Const., Art. III, §5(4), and the statutory duty to require the services of the SBI in connection with the investigation of any crime committed anywhere in the State. N.C. G.S. §114-15. In addition, he has the authority to request extradition of a person charged with a crime in North Carolina from the executive authority of any other state. N.C. G.S. §§15A-742, 15A-743(a). He is sued in his official capacity.

JURISDICTION

20. This action arises under federal law, particularly the Civil Rights Act of 1871, Title 42 U.S.C. §1983, as more fully appears below.

21. This court has jurisdiction of this cause under and by virtue of Title 28 U.S.C. §§1331 and 1343 because this is an action authorized by federal law to redress the deprivation, under color of State law, of rights, privileges, and immunities secured the Plaintiffs by the

First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Further, this Court has jurisdiction pursuant to 28 U.S.C. §2201 to grant appropriate declaratory relief, as more fully appears below.

22. Each and all of the relevant acts alleged herein done or proposed to be done by defendants were done or are proposed to be done by them as individuals and under color, authority, and pretense of the constitution, statutes, regulations, customs, and usages of the State of North Carolina and the County of Robeson and under the authority of their respective offices set forth above.

23. Defendant Robeson County is and at all times relevant hereto was a body politic and subdivision of the State of North Carolina. Defendants Joe Freeman Britt, Richard Townsend, Lee Edward Sampson, Hubert Stone, Deputy Sheriff Does I-V and District Attorney Does I-III were at all times relevant hereto agents or employees of Defendant Robeson County. All of the relevant acts alleged herein, done or proposed to be done by said Defendants,

were done or proposed to be done by them acting within the scope of such agency and under the laws of the State of North Carolina and the duly adopted Code of Ordinances for Robeson County.

FACTS: PRELIMINARY STATEMENT

24. Robeson County is the central scene for the facts giving rise to this complaint. Robeson County is composed primarily of citizens of three racial groups in roughly equal proportions: Native Americans or Indians, African Americans or Blacks, and Whites. The population consists of approximately 39% Whites, 36% Indians, and 25% Blacks. Before the 1954 Supreme Court decision in Brown v. Board of Education of Topeka, Kansas, in 1954, Robeson County was segregated de jure by race. The County had separate schools for Indians, Blacks, and Whites. Public accommodations, such as restaurants, were segregated by the three races. Public restrooms were marked WHITE, INDIAN, and NEGRO. Water fountains were similarly designated by race. Political office was reserved for Whites. The vestiges of de jure discrimination

continued at least until the decision of the United States Court of Appeals for the Fourth Circuit less than fourteen years ago in Locklear v. North Carolina State Board of Elections, 514 F.2d 1153 (4th Cir. 1975).

25. On information and belief, for several years Defendants Robeson County, Joe Freeman Britt and Hubert Stone knew or reasonably should have known of repeated allegations of abusive and assaultive behavior toward Indian and Black citizens by the Robeson County Sheriff's Department, employees and officials, and repeatedly refused and failed to enforce established procedures to insure the safety of such citizens; refused and failed to discipline individual deputies of the Robeson County Sheriff's Department, officials and employees who had been found to have committed abusive and assaultive behavior toward such citizens; refused or failed competently to investigate allegations of abuse and assault alleged to have been committed by Robeson County Sheriff's Department officials and employees; reprimanded,

threatened, harassed or intimidated Robeson County deputies and officials who reported acts of abuse of authority by other officers and officials; covered up acts of misconduct and abuse of authority by individual officers of the Robeson County Sheriff's Department and other law enforcement agencies; failed adequately to train and educate deputies and other officers and employees in the use of reasonable force and the proper use of force and authority; failed adequately to supervise the actions of deputies and officials under their control and supervision; and in general fostered and encouraged an atmosphere of lawlessness, repression and a repetitive policy, custom and practice of abusive and assaultive procedure towards Indian and Black citizens. These policies and practices contribute to a general climate of fear, effectively chilling and intimidating Indian and Black citizens from the full exercise of their First Amendment freedoms.

26. Robeson County is currently beleaguered by considerable poverty,

illiteracy and violence. A relatively new factor aggravating these difficult conditions in Robeson County is a drug trade within the county. The County, which is located on U.S. Interstate Highway 95, is a major thoroughfare between the States of Florida and New York.

FACTS

27. On February 1, 1988, Plaintiffs Eddie Hatcher and Timothy Jacobs took over the offices of THE ROBESONIAN, a newspaper published in Lumberton, North Carolina, which is in Robeson County. Said Plaintiffs took that action out of necessity and out of fear for their lives and for the life of an Indian inmate of the Robeson County Jail who had provided them information implicating Defendant Hubert Stone, the Sheriff, among others, in illegal drug activities. Their purposes were to protect themselves from an imminent threat of harm that they perceived from law enforcement officials that their information showed were complicit in the illegal drug trafficking and to motivate the Governor of North Carolina, Defendant James G. Martin, to

investigate alleged corruption in the criminal justice system in Robeson County, including the alleged involvement of Defendant Hubert Stone, the Sheriff, in illegal drug activities, and the recent death of a Black inmate of the Robeson County jail in the care and custody of Defendant Hubert Stone.

28. Defendant James G. Martin, acting through his Chief of Staff, Phillip J. Kirk, Jr., together with his General Counsel, James R. Trotter, and his Secretary of Crime Control and Public Safety, Joe Dean, negotiated an agreement with Plaintiffs Eddie Hatcher and Timothy Jacobs. Advised that said Plaintiffs did not trust, and feared for their lives in the custody of, Robeson County law enforcement authorities, Defendant James G. Martin, acting in his capacity as Governor through his aides, assured said Plaintiffs that they would be allowed to surrender to federal authorities and would not be subject to the jurisdiction of Robeson County law enforcement authorities. Said Plaintiffs accepted those assurances and surrendered

themselves to Federal Bureau of Investigation Agent Paul Daly, who was from Charlotte, North Carolina, outside of Robeson County.

29. On information and belief, Defendant James G. Martin entered into an agreement with Defendant Joe Freeman Britt and Defendant Lacy Thornburg, or either of them, and the Office of the United States Attorney for the Eastern District of North Carolina that Plaintiffs Eddie Hatcher and Timothy Jacobs would be prosecuted in federal and not state court for any crimes arising out of the takeover of THE ROBESONIAN on February 1, 1988. Pursuant to that agreement, Defendant Joe Freeman Britt dismissed warrants charging said Plaintiffs with second-degree kidnapping allegedly arising out of that takeover and the Office of the United States Attorney obtained an indictment of said Plaintiffs for federal offenses allegedly arising out of the same takeover, in Case No. 88-7-01-CR 3 and Case No. 88-7-02-CR 3. Thereafter, on July 12, 1988, the Office of the United States Attorney obtained a superseding indictment in the same case.

The indictment and the superseding indictment charged said Plaintiffs with seven felony counts, all arising out of their February 1, 1988 takeover of the office of THE ROBESONIAN, as follows: Conspiracy; Hostage-taking; Use of Firearms in the Commission of Hostage-taking; Manufacture of a Sawed-Off Shotgun; Manufacture of a Sawed-Off Shotgun; Possession of a Sawed-Off Shotgun; and False Threats.

30. Plaintiffs Eddie Hatcher and Timothy Jacobs were held in preventive detention during most of the time between their surrender on February 1, 1988, and the conclusion of their trial on October 14, 1988. See United States v. Clark, --- F.2d --- (4th Cir. Jan. 9, 1989) (in banc).

31. Plaintiffs Eddie Hatcher and Timothy Jacobs were brought to trial on the superseding indictment on September 26, 1988 before a jury in this United States District Court. During the federal proceedings, Plaintiffs Eddie Hatcher and Timothy Jacobs were represented by separate counsel but presented a joint

defense. On October 14, 1988, the jury returned a verdict of not guilty on all counts and this United States District Court then entered judgment of acquittal on all counts as to both of said Plaintiffs. Following their acquittal, said Plaintiffs, each represented by the same attorneys who represented him in the federal proceedings, continued to present a joint defense with regard to possible state charges.

32. After their acquittal, Plaintiffs Eddie Hatcher and Timothy Jacobs were released from preventive detention and from federal custody. Plaintiff Eddie Hatcher returned to Robeson County and began working with Plaintiff Robeson Defense Committee and the other Plaintiffs in lawful activities protected by the First Amendment to the United States Constitution to bring about political change in Robeson County and to eliminate the conditions of discrimination and oppression of the Black and Indian citizens of Robeson County, and to clean up the alleged corruption in Robeson County, especially the alleged involvement

of Defendant Hubert Stone in illegal drug activities. To these ends, Plaintiffs held public meetings, distributed literature, appeared on television programs, and met with reporters for the print and electronic media, making statements about the aforesaid conditions in Robeson County. Plaintiffs and others began circulating a petition pursuant to N.C. G.S. §§128-16 et seq. seeking the removal of the Sheriff.

33. On information and belief, in response to the lawful, constitutionally protected activities of Plaintiffs, Defendants Joe Freeman Britt, Hubert Stone, Lee Edward Sampson, Lacy Thornburg, Robert Morgan, James Bowman, and the District Attorney Does, the Deputy Sheriff Does and the SBI Does, or any two of them, conspired and agreed among and/or between themselves and diverse others to conduct a campaign of intimidation and harassment against Plaintiffs and Plaintiffs' supporters and/or sympathizers, with the designed purpose and/or foreseeable effect being (1) to discourage other persons from participating in any lawful activities

conducted by Plaintiffs out of fear of retaliation against such persons by said Defendants; (2) to stop Plaintiffs from engaging in such activities by frightening other persons into refusing their cooperation; (3) to prevent Plaintiffs Eddie Hatcher and Timothy Jacobs from engaging in such activities by charging them with felonies and incarcerating them in the Robeson County Jail; (4) to discredit Plaintiffs by charging Plaintiffs Eddie Hatcher and Timothy Jacobs with felonies and by disseminating false and misleading information about them through the print and electronic media and otherwise; and (5) to exploit the campaign of intimidation and harassment to secure the appointment of Defendant Richard Townsend as District Attorney, to replace Defendant Joe Freeman Britt, who was scheduled to resign as District Attorney in the middle of his term to become a Superior Court Judge on January 1, 1989.

34. Specifically, following the acquittal in this United States District Court of Plaintiffs Eddie Hatcher and

Timothy Jacobs, and their resumption of political work designed to create social change for Blacks and Indians in Robeson County, Defendants Joe Freeman Britt and Richard Townsend, on or about December 6, 1988, convened a state grand jury to indict Plaintiffs Eddie Hatcher and Timothy Jacobs. Said Plaintiffs were indicted on fourteen counts of second degree kidnapping arising out of the same events of February 1, 1988, that gave rise to the federal hostage-taking, conspiracy, firearms and false threats charges upon which they had already been acquitted in this United States District Court.

35. Defendants reportedly informed the press of their alleged plans to seek state charges against Plaintiffs Eddie Hatcher, Timothy Jacobs and others. Defendant Joe Freeman Britt reportedly told the press that he would first review the record of the federal trial and had ordered a transcript for that purpose. On information and belief, that statement was false and/or misleading insofar as said Defendant never did order a transcript of the federal trial and neither did any

person acting on his behalf or with his knowledge. Rather, said statement was made and/or caused to be disseminated widely throughout the press for the designed purpose and/or anticipated effect of intimidating and frightening Plaintiffs Eddie Hatcher and Timothy Jacobs and their supporters, and of suppressing political dissent.

36. In addition, Defendants Joe Freeman Britt and SBI Does I-III, or any one of them, reportedly did represent or cause to be represented to members of the press and thereby to be widely disseminated false and/or misleading statements suggesting that persons other than Plaintiffs Eddie Hatcher and Timothy Jacobs conspired and/or otherwise participated in the planning of the February 1, 1988 takeover of THE ROBESONIAN and that an intensive investigation into whether Plaintiffs Eddie Hatcher and Timothy Jacobs had conspired with others was in progress and that Plaintiff Jacobs' attorneys were targets of the investigation. No such charges have ever been filed.

37. On information and belief, Defendant Joe Freeman Britt, in early November 1988, reportedly informed the press that the SBI had expanded its investigation to include the possibility of obstruction of justice and interference with state witnesses charges, then declined to comment further. No such charges have ever been filed.

38. All of the aforementioned statements were made and/or caused to be disseminated in violation of investigatory policies and procedures and for the designed purpose and/or the anticipated effect of intimidating Plaintiffs and their supporters and of suppressing political dissent.

39. After the indictment issued on December 6, 1988, Plaintiff Timothy Jacobs was arrested in New York State on December 13, 1988. His North Carolina counsel appeared on his behalf in New York State, and on December 14, 1988, wrote to Defendant James G. Martin asking that he not seek the extradition of said Plaintiff.

40. Following Plaintiff Timothy

Jacobs' arrest, Defendants Lee Edward Sampson, James Bowman and Richard Townsend, under the direction, control and/or supervision of Defendants Joe Freeman Britt and Richard Townsend, did approach the family and friends of Plaintiff Timothy Jacobs, without any notice to said Plaintiff's counsel, and, requested that certain information, vague promises and offers be communicated to Plaintiff Jacobs on their behalf. Defendants Lee Edward Sampson and James Bowman asked those family members and friends to advise Plaintiff Timothy Jacobs, among other things, (1) that he should dismiss his present attorneys and retain local attorneys or seek to have the court appoint local attorneys to represent him; (2) that his present counsel were not loyal to his interests, but were instead seeking only to advance themselves through the media, and (3) that he would be better served by a local attorney who could "work in the system." Defendants Lee Edward Sampson and James Bowman further asked these family members to advise Plaintiff Timothy Jacobs to return voluntarily to

North Carolina and to testify against Plaintiff Eddie Hatcher and implicate other persons in a conspiracy. Said Defendants advised family members to communicate to Plaintiff Timothy Jacobs that compliance with their suggestions would earn him "green stamps." Said approaches were designed to and/or had the anticipated effect of interfering with Plaintiff Timothy Jacobs' exercise of his right to counsel and/or of disrupting the relationship between said Plaintiff and his counsel and the joint defense of Plaintiffs Timothy Jacobs and Eddie Hatcher.

41. Defendants SBI agents James Bowman and SBI Does I-III, or any of them, did interrogate, in a harassing and intimidating manner, friends, supporters and associates of Plaintiffs Eddie Hatcher and Timothy Jacobs, especially leaders and members of the Tuscarora Nation and supporters of Plaintiff Robeson Defense Committee, following their acquittal in federal court. Among the information sought by Defendants during their interrogations was the membership rolls of

the Tuscarora Tribe and of Plaintiff Robeson Defense Committee. Said interrogations were designed to and/or had the anticipated effect of intimidating and frightening persons from exercising their freedoms of speech and association as guaranteed them by the First Amendment to the United States Constitution.

42. On or about October 25, 1988, Plaintiff Robeson Defense Committee held a public meeting at West Robeson High School, in accordance with the established policy of the Robeson County Board of Education. Thereafter, on information and belief, Defendants Sheriff Hubert Stone and Deputy Sheriff Does I-IV, or any one of them, caused legally required and otherwise customarily provided security for West Robeson High School basketball competitions to cease to be provided by Defendant Sheriff department. Said termination of customarily provided security services was in retaliation for West Robeson High School's compliance with the policy of the school board and the First Amendment in allowing Plaintiff Robeson Defense Committee to hold a

meeting on its premises, and was designed to suppress political dissent.

43. On information and belief, Defendants Sheriff Hubert Stone and Deputy Sheriff Does I-IV continued to pressure, intimidate and frighten other public entities into refusing usage of their facilities to Plaintiff Robeson Defense Committee for the purpose of suppressing political dissent by undermining Plaintiffs' effective exercise of their First Amendment rights.

44. In late 1988, Defendant Joe Freeman Britt was scheduled to resign as District Attorney in the middle of his term to become a Superior Court Judge on January 1, 1989 as a result of his election after his opponent, Indian Julian Pierce, was murdered. Pursuant to Article IV, §19 of the North Carolina Constitution and N.C. G.S. §163-10, the Governor, Defendant James Martin, had the authority to appoint his successor for the unexpired term of his office. Defendant Richard Townsend and two other attorneys were candidates for that appointment. Only one of the three was a member of the

Republican Party, the same party as the Governor. Defendants Joe Freeman Britt, Richard Townsend, Lacy Thornburg and Robert Morgan, all Democrats and political allies, or any two of them, in order to orchestrate the appointment of Defendant Richard Townsend, utilized the campaign of intimidation and harassment to make the question of reprosecution of Plaintiffs Eddie Hatcher and Timothy Jacobs an issue in the appointment, to intensify the tension and publicity surrounding that issue, and to portray Defendant Richard Townsend as the most suitable candidate to pursue that prosecution. Utilizing agents of the State Bureau of Investigation as political police, in violation of the policies and regulations of the SBI, Defendants caused such agents to pursue an investigation of the one Republican among the candidates that would have as its purpose the discrediting of the viability of that candidacy.

45. On information and beliefs, Defendants, or any two of them, further conspired and agreed among and/or between themselves to conceal the existence of the

conspiracy and said campaign of intimidation and harassment.

CAUSES OF ACTION

First Claim

46. Pursuant to their campaign of intimidation and harassment, and by the acts alleged herein, Defendants did unlawfully interfere and/or attempt to interfere with activity of the Plaintiffs protected by the First Amendment to the United States Constitution, all in violation of the First Amendment to the United States Constitution and 42 U.S.C. §1983.

47. Pursuant to their campaign of intimidation and harassment, and by the acts alleged herein, Defendants did purposefully disseminate threatening and false information about Plaintiffs to deter them from engaging in activity protected by the First Amendment to the United States Constitution, all in violation of the First Amendment to the United States Constitution and 42 U.S.C. §1983.

48. Pursuant to their campaign of intimidation and harassment, and by the

acts alleged herein, Defendants did purposefully disseminate threatening and false information about Plaintiffs to deter others from associating and cooperating with Plaintiffs in their exercise of their First Amendment freedoms, all in violation of the First Amendment to the United States Constitution and 42 U.S.C. §1983.

Second Claim

49. Pursuant to their campaign of intimidation and harassment, and by the acts alleged herein, Defendants Joe Freeman Britt, Richard Townsend, Lee Edward Sampson, and James Bowman did intentionally interfere and/or attempt to interfere with the attorney-client relationship between Plaintiff Timothy Jacobs and his attorneys, all in violation of Plaintiff Timothy Jacobs' rights secured by the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

50. Pursuant to their campaign of intimidation and harassment, and by the acts alleged herein, Defendants did attempt to sow dissension and distrust

between Plaintiffs Eddie Hatcher and Timothy Jacobs, and Plaintiff Timothy Jacobs and his attorneys, and thereby disrupt said Plaintiffs' joint defense, all in violation of said Plaintiffs' rights secured by the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

Third Claim

51. Pursuant to their campaign of intimidation and harassment, and by the acts alleged herein, Defendants Joe Freeman Britt, Richard Townsend, Lee Edward Sampson, and James Bowman did unlawfully attempt to coerce incriminating testimony from Plaintiff Timothy Jacobs against Plaintiff Eddie Hatcher, all in violation of Plaintiff Eddie Hatcher's rights secured by the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

Fourth Claim

52. Pursuant to their campaign of intimidation and harassment, and by the acts alleged herein, Defendants SBI agents James Bowman and SBI Does I-III did purposefully and unlawfully interrogate

friends, supporters and associates of Plaintiffs Eddie Hatcher and Timothy Jacobs, including members of Plaintiff Robeson Defense Committee, for the purpose of intimidating citizens and suppressing political dissent, all in violation of Plaintiffs' rights secured by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

53. Pursuant to their campaign of intimidation and harassment, and by the acts alleged herein, Defendants Hubert Stone and Deputy Sheriff Does I-IV did purposefully coerce, intimidate and harass third parties into taking action adverse to Plaintiffs for the purpose of preventing Plaintiffs' exercise of their First Amendment freedoms, all in violation of Plaintiffs' rights secured by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

Sixth Claim

54. Pursuant to their campaign of intimidation and harassment, and by the acts herein alleged, defendants Joe Freeman Britt and Richard Townsend did abusively and in bad faith convene a grand

jury for the purpose of suppressing political dissent by causing indictments to be issued against Plaintiffs Eddie Hatcher and Timothy Jacobs on state charges arising out of the same events for which plaintiffs had secured a federal acquittal, all in violation of Plaintiffs' rights under the First and Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

55. Pursuant to their campaign of intimidation and harassment, and by the acts alleged herein, Defendants Joe Freeman Britt and Richard Townsend did initiate and pursue criminal prosecution of Plaintiffs Eddie Hatcher and Timothy Jacobs in contravention of the agreement made by the Governor of the State of North Carolina and in violation of the Double Jeopardy Clause of the Fifth Amendment, all in violation of Plaintiffs' Hatcher and Jacobs' rights secured by the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

Seventh Claim

56. Pursuant to their campaign of intimidation and harassment, and by the

acts alleged herein, Defendants Lacy Thornburg and Robert Morgan were or should have been aware of the actions of Defendants James Bowman, Joe Freeman Britt, Lee Edward Sampson, Hubert Stone, SBI Does I-III, Deputy Sheriff Does I-V and DA Does I-III, or any one of them, complained of herein, and approved, acquiesced in, tacitly authorized, or were deliberately indifferent to those actions and the injuries caused thereby, all in violation of Plaintiffs' rights secured by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

57. In sum, as a direct and proximate result of Defendants' acts described in the foregoing paragraphs, Plaintiffs at the time of the occurrences recited herein and up through and including the present date have been damaged in the following particulars:

(A) The campaign of intimidation and harassment has substantially and materially interfered with the First Amendment protected activities of all Plaintiffs and has had a chilling effect

on the First Amendment protected activities of many persons who had theretofore expressed a desire and/or intent to join, support, or associate with Plaintiffs' activities but are now afraid to do so.

(B) The campaign of intimidation and harassment has resulted in a criminal prosecution of Plaintiffs Eddie Hatcher and Timothy Jacobs that was brought in bad faith, in violation of the agreement between Plaintiffs Eddie Hatcher and Timothy Jacobs and the Governor of North Carolina, Defendant James G. Martin, and in violation of the Due Process Clause of the Fourteenth Amendment in that it constitutes Double Jeopardy.

(C) The campaign of intimidation and harassment has resulted in substantial and material and apparently irreparable interference with the right to counsel of Plaintiffs Eddie Hatcher and Timothy Jacobs and in the substantial and material and apparently irreparable disruption of the preparation of their defense to the felony charges by reason of the serious violation of their right to counsel as

protected by the Due Process of Law Clause of the Fourteenth Amendment.

WILLFUL AND WANTON CONDUCT

58. By virtue of the foregoing, Defendants Joe Freeman Britt, Richard Townsend, Lee Edward Sampson, Hubert Stone, Lacy Thornburg, Robert Morgan, James Bowman, SBI Does I-III, Deputy Sheriff Does I-V, and DA Does I-III, disregarded their professional duties and responsibilities and were guilty of willful and wanton conduct evidencing a reckless disregard of Plaintiffs' rights under the Constitution of the United States, in violation of 42 U.S.C. §1983.

CASE AND CONTROVERSY

59. By reason of all of the foregoing, an actual case or controversy exists between the Plaintiffs and the Defendants.

PRAYER

WHEREFORE, Plaintiffs pray for relief as follows:

A. That an injunction be issued enjoining Defendant Richard Townsend, his agents or successors, from proceeding with any prosecution of Plaintiffs Eddie

Hatcher or Timothy Jacobs for any offenses allegedly arising out of the takeover of THE ROBESONIAN on February 1, 1988.

B. That an injunction be issued enjoining Defendant James G. Martin, his agents or successors, from proceeding with any extradition of Plaintiffs Eddie Hatcher or Timothy Jacobs for any offenses allegedly arising out of the takeover of THE ROBESONIAN on February 1, 1988.

C. That an injunction be issued enjoining Defendants Joe Freeman Britt, Richard Townsend, Lacy Thornburg, Robert Morgan, James Bowman, SBI Does I-III, Hubert Stone, and Deputy Sheriff Does I-V from engaging in their campaign of intimidation and harassment and from engaging in any activity designed to interfere with the First Amendment activities of Plaintiffs or persons who wish to join with them.

D. That an injunction be issued enjoining Defendants Richard Townsend, Lee Edward Sampson, James Bowman, SBI Does I-III, Deputy Sheriff Does I-V, and DA Does I-III, from violating the right to counsel of Plaintiffs Eddie Hatcher and

Timothy Jacobs by discussing the case against Plaintiff Timothy Jacobs in any manner with Plaintiff Timothy Jacobs, his family members or friends, outside the presence of or without the consent of his counsel.

E. For damages in excess of $10,000 for the violation of their constitutional rights against each defendant sued in his individual capacity and against Defendant Robeson County. Provided, that Plaintiffs Eddie Hatcher and Timothy Jacobs do not seek damages against Defendants Joe Freeman Britt or Richard Townsend for the specific conduct only of causing the state felony indictments to be brought against them, notwithstanding that they acted in bad faith, by reason of their immunity from damages for that specific conduct.

F. For exemplary damages in a fair and reasonable amount in excess of $10,000 against each Defendant sued in his individual capacity and against Defendant Robeson County. Provided, that Plaintiffs Eddie Hatcher and Timothy Jacobs do not seek damages against Defendants Joe Freeman Britt or Richard Townsend for the

specific conduct only of causing the state felony indictments to be brought against them, notwithstanding that they acted in bad faith, by reason of their immunity from damages for that specific conduct.

G. That a declaratory judgment issue declaring unconstitutional the campaign of intimidation and harassment, including at least the following aspects of that campaign of intimidation and harassment:

(1) The threats to withhold law enforcement services from persons who support or aid Plaintiffs.

(2) The interrogation of persons who support or aid Plaintiffs without any legitimate criminal investigatory purpose.

(3) The seeking of membership lists and information about membership activity of Plaintiffs and their supporters.

(4) The interference with the right to counsel of Plaintiffs Eddie Hatcher and Timothy Jacobs.

(5) The state felony prosecution of Plaintiffs Eddie Hatcher and Timothy Jacobs.

H. That, pending a hearing by this

Court on the merits of this Complaint for a permanent injunction, a temporary injunction be issued restraining Defendants in the following respects:

(1) Both Plaintiffs Eddie Hatcher and Timothy Jacobs are in the custody of other jurisdictions as a result of the climate of fear and oppression and the current campaign of intimidation and harassment in Robeson County. Plaintiff Eddie Hatcher is subject to forfeiture of a $25,000 bond put up on his behalf by the National Council of Churches. Said Plaintiffs request a temporary restraining order restraining Defendant Richard Townsend and his agents or successors from proceeding with the criminal prosecution in any respect, including the forfeiture of bond, and restraining Defendants Richard Townsend and James G. Martin and their agents or successors from pursuing any extradition proceedings against said Plaintiffs, pending a hearing on a temporary or permanent injunction.

(2) All Plaintiffs request a temporary restraining order restraining Defendants Joe Freeman Britt, Richard

Townsend, Lacy Thornburg, Robert Morgan, and James Bowman and their agents and successors from engaging in their campaign of intimidation and harassment and from engaging in any activity to interfere with the First Amendment activities of Plaintiffs or persons who wish to join with them, pending a hearing on a temporary or permanent injunction.

(3) Plaintiffs Eddie Hatcher and Timothy Jacobs request a temporary restraining order restraining Defendants Richard Townsend, Lee Edward Sampson and James Bowman and their agents and successors from violating the right to counsel of Plaintiffs Eddie Hatcher and Timothy Jacobs by attempting to discuss the case against them with them directly or indirectly in any manner with their family or friends outside the presence of or without the permission of their counsel, pending a hearing on a temporary or permanent injunction.

I. For costs of suit, including reasonable attorneys' fees, pursuant to 42 U.S.C. §1988.

J. For such other and further relief

as the Court deems just and equitable.

K. Plaintiffs request trial by jury.

Respectfully submitted,

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[Dated:] March 16, 1989

CONSTITUTION OF THE UNITED STATES
FIFTH AMENDMENT
ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

RULE 11
SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well

grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.